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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 8

UNITED STATES OF AMERICA,
Appellant,

—v.—

HUCK MANUFACTURING COMPANY and TOWNSEND COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR APPELLEES

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

JOHN A. BLAIR
J. KING HARNESS
JOHN C. STERRITT
700 Fisher Building
Detroit, Michigan 48202

ALBERT M. STERN
2388 First National Building
Detroit, Michigan 48226

Attorneys for Appellee Huck Manufacturing Company

THOMAS W. POMEROY, JR.
S. K. McCUNE
W. WALTER BRAHAM, JR.
1100 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Appellee Townsend Company

Of Counsel:
ARNOLD, FORTAS & PORTER
Washington, D. C.
HARNESS, DICKEY & PIERCE
Detroit, Michigan
STERN and ROSSIER
Detroit, Michigan
KIRKPATRICK, POMEROY, LOCKHART & JOHNSON
Pittsburgh, Pennsylvania

September, 1965.

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the District Court dismissing the complaint on motion under Rule 41 at the close of the Government's case is reported at 227 F. Supp. 791, and appears at R. 700-22. The opinion of another district judge in the District Court for the Eastern District of Michigan, granting motions for judgments of acquittal at the close of the Government's case in a companion criminal prosecution against appellees and their presidents, is reported at 214 F. Supp. 776.

QUESTIONS PRESENTED

1. Whether this Court should relieve the Government from its repeated waiver in the District Court of any intention to challenge the doctrine of the *General Electric* case (*United States* v. *General Electric Co.*, 272 U. S. 476 (1926)) in this matter, and permit the question of the continuing validity of that case to be raised for the first time on direct appeal to this Court?

2. Whether the present record permits the conclusion that the *General Electric* case should no longer be considered to be a proper accommodation of the antitrust laws and the patent laws, and should be overruled by this Court?

3. Whether the agreement alleged to exist here between a patentee and its licensee, whereby in return for an exclusive license for the life of the patent the licensee agreed to maintain the patentee's prices in the sale of the patented items, would, if proved, amount to a violation of Section 1 of the Sherman Act, the rule of the *General Electric* case notwithstanding?

STATEMENT

This appeal arises out of the civil side of companion civil and criminal antitrust actions filed against Huck Manufacturing Company ("Huck") and Townsend Manufacturing Company ("Townsend") by the United States in October, 1961. The indictment in the criminal case and the complaint in the civil case were couched in substantially similar terms. Each charged a combination and con-

spiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and a combination and conspiracy "to monopolize the aforesaid[1] interstate trade and commerce in lockbolts" in violation of Section 2 of the Sherman Act. (See Complaint, para. 14, R. 4.) The Complaint did not identify the trade and commerce involved other than by explaining what "lockbolts" were.

The Criminal Trial[2]—The criminal trial took place first and was held before Judge Kaess in the District Court for the Eastern District of Michigan, and a jury, in February and March, 1963. It was undisputed at the trial that lockbolts are a form of fastening device used to join pieces of metal; that the lockbolt is used in the aircraft industry,[3] in the construction of trucks, trailers, railroad cars, and ships, and in various other industrial applications. (R. 42-43, 336) Conventional nuts and bolts, rivets and other specialized fasteners are alternative methods of fastening to lockbolts. (R. 366)

The evidence showed that lockbolts in the form sold by appellees are patented products. The basic patents are U. S. Patents Nos. 2,531,048 and 2,531,049, which were issued on November 21, 1950, to Huck Manufacturing Company as assignee of the inventor, Louis Huck, the founder and president of the company. These patents will expire

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[1] The "aforesaid" trade was not more precisely defined than as the domestic trade in lockbolts. (Complaint, paras. 6-13, R. 2-3)

[2] For reasons which will be developed later (pp. 10-11), the transcript of the criminal trial constituted the evidence in the civil case. Thus the references to the record on appeal which we make at this point are in fact references to the transcript of the criminal case.

[3] Though in competition with other fasteners; at least one airframe manufacturer never used lockbolts at all. (R. 366) The record, for reasons that will be developed later, does not indicate the proportions of use of lockbolts and of use of substitute fasteners by those airframe manufacturers who did make use of lockbolts.

on November 21, 1967. The validity of these patents was not, and has not been, challenged by the Government.

Huck and Townsend each are engaged in the manufacture of lockbolts. Huck's plant is in Detroit and Townsend's plants are at Santa Ana, California, and Ellwood City, Pennsylvania. Both Huck and Townsend sell lockbolts throughout the United States. (R. 2, 9, 13)

Both Huck and Townsend are small producers. Total domestic sales of lockbolts by Huck and Townsend in 1960 amounted to about $6 million. Huck's sales were about $3.5 million and Townsend's about $2.5 million. (GX 80, 103, R. 614, 643)

In September, 1954, Huck entered into a patent licensing agreement with Townsend. (GX 17; R. 469) The patent license covered the basic patents identified above, certain earlier patents, and two subsequent patent applications for improvements owned by Huck. A five per cent royalty was provided for on the net selling price of all devices manufactured and sold by Townsend which were covered by any of the patents licensed.[4] (Para. 2, R. 470) The agreement provided that the license would be exclusive for the first two years of its life, and that during that period Townsend was "to maintain at least Huck's prices" on the licensed products. (Para. 12, R. 472) Apart from this, the license was nonexclusive and there were no price restrictions.[5] (Para. 1, R. 470)

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[4] There were also provisions designed to make sure that Townsend's quality was up to Huck's standards. (Paras. 9, 10, 11, 17, R. 471-72, 473) Certain other provisions were aimed at the accurate computation and payment of the specified royalties. (Paras. 3, 4, 5, 6 and 7, R. 470-71)

[5] Townsend also granted back to Huck a nonexclusive, royalty-free license, containing no price maintenance provision, on improve-

At the criminal trial, the Government did not challenge the rule of the *General Electric* case, *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), that a patent owner who manufactures and sells patented articles may, without violation of the Sherman Act, license another to make and sell the patented articles and require the licensee, as to those articles, to observe and follow the patent owner's prices. Rather, it sought to prove that the conduct of Huck and Townsend went beyond that allowable under *General Electric*.

The Government's evidence at the criminal trial, which took place in February and March, 1963, consisted of certain documentary evidence and the oral testimony of four witnesses, all of them former employees of Huck or of Townsend.[6] The principal witness was one Robert Looker. He was the stepson of Louis Huck, founder and president of Huck Manufacturing Company. He joined Huck in 1947 and rose in the company until, in 1954, he became its highest ranking sales executive. From 1954 until 1956, Looker had principal responsibility for Huck's patent matters including its patent licensing policies. (R. 53)

Looker left Huck in August, 1956, to become president of Brown-Line Corporation ("Brown-Line"), a company which made various products used in the aviation industry but which did not manufacture lockbolts. Commencing in

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ment or substitute lockbolt devices invented by Townsend. (Para. 8, R. 471) Subsequently, Huck issued certain other licenses to Townsend on a nonexclusive basis and with no price restriction provisions. These other licenses, which are not challenged in this Court, were the lockbolt stump and collar license (GX 19; R. 476); a license and a sales agreement covering lockbolt installation tools (GX 70, 71; R. 567, 579); and a "know-how" license covering blind lockbolts. (GX 72, R. 584)

[6] An FBI photographer also briefly testified to identify certain pictures of lockbolts. (R. 320)

1956, Looker wrote a series of letters on behalf of Brown-Line seeking to obtain from Huck a license under Huck's lockbolt patents.[7] (GX 60, 61, 64, 65; R. 559, 560, 562, 563-64) Huck declined to issue such a license. In 1958, Looker began a correspondence with the Department of Justice urging the Department to take action against Huck under the antitrust laws.[8] (R. 237-39, 252-70, 657-58, 664-72)

Looker testified that he had participated in the negotiations which culminated in the licensing agreement between Huck and Townsend in September, 1954. Looker testified that he attended a meeting some time before that agreement was executed, in the offices of Harness, Dickey & Pierce, Huck's attorneys in Detroit, at which the license was negotiated. (R. 59-60; 182)

Looker testified that there came a time during this meeting when the attorneys for Huck and Townsend, who had been engaged in working out the proposed terms of the license agreement, were asked to leave the room, and that the

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[7] The Government erroneously states that the license which Brown-Line requested was simply for lockbolts of a sort not manufactured by Huck. (Gov't Br., p. 8, n. 5) Actually, Brown-Line sought a license generally to manufacture lockbolts under certain described Huck patents, including those manufactured by Huck. (GX 60, 61, 63, R. 559-61) The only exclusion from Brown-Line's request was for those devices which were manufactured and sold by Huck "as standard parts". (GX 60, R. 559)

[8] This correspondence led into other matters, such as Looker's passing on reports of price-fixing among certain of Brown-Line's competitors in the aircraft seat fittings industry (in which Huck and Townsend do not participate), congratulations to the Justice Department for its "splendid work" in the Philadelphia electrical industry price-fixing case, explanation in response to a letter from Assistant Attorney General Bicks as to how certain personal papers of Mr. Huck happened to come into Looker's possession, expressions of fears that the Department would "negotiate" with Huck, anticipatory refutations of any "malice" existing between him and Huck, and so forth. (Defs. Exs. R, S, U, V, X, R. 664-68, 671)

meeting thereafter continued without them for a period of about 45 minutes. (R. 63-64, 72) On cross-examination, Looker admitted that the occasion for asking the attorneys to leave the room was, however, the outbreak of acrimony involving the attorneys. The attorney for Townsend had stated that a statement the attorney for Huck had made amounted to "a fine way to call a guy an S.O.B." Looker stated that more than the initials were used. (R. 307)

After the attorneys had been asked to leave the room, according to Looker, Townsend's president proposed that the companies enter into what Looker characterized as a "supplementary verbal agreement to the effect that the Townsend Company would not violate the Huck lockbolt price structure during the life of the agreement, if the Huck Manufacturing Company refused to, or restrained themselves from issuing patent licenses to potential competitors to the Townsend Company." (R. 67) Looker testified that the president of Huck thereafter said, "as best I can recall, words to the effect that 'then we won't issue more loekbolt patent licenses if you keep our price structure for lockbolt devices.'"[9] (R. 69) The record does not indicate why the parties should have been unwilling to put

[9] The only other evidence offered in support of Looker's story by the Government was a handwritten notation appearing in the margin of a letter written in April, 1951, from Huck's attorneys to the executive vice president of Huck. (GX 27, R. 509) The letter, written more than three years before the issuance of the license, on an earlier occasion when licensing Townsend was being contemplated, discussed the various provisions which might be put in a patent license. Opposite the attorneys' discussion of an exclusivity clause, there appeared the handwritten notation "?—not in writing—agreed for period of (3) yrs. in writing." There was no evidence as to when this handwritten note was put on or what it meant. Various other handwritten notes in the margin of the letter relating to royalties were at variance with the actual terms of the 1954 license granted to Townsend. (R. 510)

this alleged provision in the written agreement, which as later executed in fact contained such a provision for a two-year period.

It was developed on cross-examination that Looker had, after the commencement of this action, filed a treble damage suit against Huck based on Huck's failure to grant Brown-Line a license. That claim was based entirely on damages said to accrue after the expiration of the two-year period of exclusiveness provided for in the license agreement, and, of course, after the time that Looker left Huck to join Brown-Line.[10] Looker admitted that: "We feel now that we can afford a low-cost case [in his private antitrust suit], so to speak, if we have a prima facie case."[11] (R. 285)

It was also brought out on cross-examination that on a number of occasions Looker recognized that Huck was not bound to maintain any exclusiveness after September, 1956, and that the price restrictions would expire then. (R. 219, 273; Defs. Ex. Y, R. 672-73; GX 59, 60, 61, 64, R. 558-60, 562) Thus, in a memorandum of August, 1955, when he was still with Huck, Looker stated, with reference to a request for a license, that "Although we may not be at liberty to grant such a license at this time, we will be in a little over a year from now." (Defs. Ex. Y, R. 673) A memorandum written by Looker shortly before he left Huck, and about four months before the end of the two-year period, suggested that Huck license another source. (GX 59, R. 558) And a memorandum written by Looker

[10] Looker left in August, 1956, before the two-year period was up.

[11] Since Looker's company was not a user of lockbolts, it could well be said that it was not damaged by the price-restrictive provision (if it were unlawful); and in any event its damages would be hard to prove. Therefore, it was essential to Looker's "low-cost case" that the allegedly exclusive feature of the license in the post-1956 period be established and held to be unlawful.

in December, 1955, to Huck's president reflected that the price restrictions upon Townsend would expire at the close of the "balance of the two-year period." (GX 44, R. 542)

The proofs indicated that on various occasions before and after the close of the two-year period Huck refused to grant licenses for a general line of lockbolts to other companies. (Olympic Screw and Rivet Company, R. 102-03; R. 398-99; GX 66, 68, R. 564-66; GX 92, R. 628; GX 98, R. 636; Republic Steel Corporation, R. 104-05; Illinois Tool Works, GX 78, R. 611; Pheoll Manufacturing Company, R. 99-100) The record contained no evidence that Townsend participated in these refusals or that it was even aware that applications for licenses had been made by any of these companies to Huck. Huck licensed two firms, without price restrictions, to make titanium lockbolts; a metal in which neither it nor Townsend worked. (Fdg. 22, R. 712) There was no evidence of the extent to which titanium lockbolts competed with those of other metals.

At the close of the Government's case, Judge Kaess granted motions for a judgment of acquittal on the charges both under Section 1 and under Section 2. Judge Kaess held that, for the purposes of the motion, the Government had established "at least prima facie" [12] that Huck had a continuing arrangement with Townsend under which Huck determined the selling prices of the patented product and under which no other firm was licensed. 214 F. Supp., at 777. However, Judge Kaess held that, even assuming an arrangement of the sort to which Looker testified, no violation of the Sherman Act could be inferred. Noting that the Govern-

[12] Clearly such an arrangement was shown *prima facie*, inasmuch as Looker testified to it. Judge Kaess was sitting with a jury (R. 18) and had no basis to pass on Looker's credibility in this connection; he had to accept it for purposes of passing on the motion.

ment "has indicated that it does not consider the problem of defining the relevant market to be part of its case" and that it had not offered evidence as to the positions of Huck and Townsend in the fastener industry generally, he concluded that: "It has not been shown that the object of defendants' patent arrangement was to secure a greater reward than that attributable to the superiority of the products, or to achieve monopoly power." (214 F. Supp., at 777, 779)

The formulation of the issues in the civil case.—In pretrial conferences in the civil case held in October, 1962, it was established that: "The Government is proceeding on the same theory of law in this case as it has advanced in the criminal case." (R. 767) There was an initial pretrial conference held on October 1 at which the Government undertook to restudy the matter and to advise the defendants of its position as to the applicability of the *General Electric* case.

After a two-week study, the Government advised the court and the parties on October 15, 1962, that the *General Electric* doctrine "is still good law" and that it was not "attempting to have the doctrine set in the General Electric case overruled." The pretrial order resulting from that conference[13] recited that "[T]he Government stated that it is not attempting to have the doctrine set in the General Electric case overruled and stated only that facts in this case do not fall within that doctrine; that the

[13] The pretrial order in question was not entered until after the Government filed its notice of appeal to this Court. Then, after a hearing at which the order was amended to reflect the concessions made by the Government in October, 1962, as reflected in the notes of the Judge's law clerk taken at the time (R. 755-56), the order was entered. The Government attempts to belittle the order in its brief (pp. 46-47) but does not challenge its accuracy in this Court; in fact, its accuracy was conceded below. (R. 756)

doctrine is still good law but does not apply as the actions in this case are illegal without application of the doctrine." (R. 767-68)

Shortly after the October 15 pretrial conference, Assistant Attorney General Loevinger sent a confirmatory letter to Judge Machrowicz, to whom the civil case had been assigned, advising of the legal theory which the Government intended to follow in the civil case. The letter was restricted to a description of the way the facts of the case, according to the Government's contentions, differed from the facts of *General Electric*. It concluded: "Accordingly, we submit that the facts of this case fall outside the facts and law of *United States* v. *General Electric*, supra." (R. 779-81)

After this position was taken, and subsequent to the trial of the criminal case, at the instance of the Government, the appellees agreed that the entire Record in the criminal action "is to be placed in evidence in this [the civil] action subject to all objections appearing therein. Such Record shall constitute the plaintiff's case-in-chief in this action and on which plaintiff will rest. Defendants will move by April 15, 1963 pursuant to the Federal Rules of Civil Procedure for a dismissal of this action on that Record." (R. 17) Thereafter, the Government submitted the transcript of the criminal case to Judge Machrowicz, sitting in the civil case, and appellees moved to dismiss under Rule 41(b) of the Federal Rules of Civil Procedure. (R. 694) Once again, the Government in its trial brief specifically took the position that it would establish its antitrust charges on the basis that the conduct in question fell outside the limits of permissible conduct under the *General Electric* decision. (Gov't Tr. Br., p. 50)

The civil case and the District Court's findings.—After oral argument (R. 696-99), held in April, 1963, Judge Machrowicz, following an independent study of the record[14] (R. 705), concluded, as had Judge Kaess in the criminal case, that the conduct of Huck and Townsend did not go beyond that permissible under the *General Electric* decision, and that accordingly there should be judgment for Huck and Townsend at the close of the Government's case. (R. 700-22)

The District Court found that Huck's position in licensing Townsend in 1954 was that it "wanted to issue no more licenses under lockbolt patents than it believed would adequately supply the demand for the patented lockbolts and alleviate the difficulties it faced, namely, the demand of customers for a second source of supply, and delay in meeting delivery dates specified by the customers."[15] (Fdg. 13, R. 708)

The District Court's findings discussed Looker's testimony as to the alleged oral agreement simply as being Looker's testimony, and made no finding of the existence of any such agreement.[16] (Fdg. 15, R. 709) The court did, however, find that Looker, "inconsistent with his pres-

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[14] No collateral estoppel or *res judicata* effect has been or is contended for as between the judgment in the criminal case and this case.

[15] Thus, Douglas Aircraft Company complained about Huck's deliveries and requested that a second source be established. Others complained of delivery schedules during the period when Huck was a sole producer. (R. 56, 58)

[16] After referring four times to the alleged oral agreement as "the testimony of Looker," or Looker's or the Government's "contention" (Fdgs. 15 and 16, R. 709-11), the District Court once failed to repeat this qualification in referring to it. (Second sentence, Fdg. 16, R. 711) The Government's Brief attempts to escalate this omission into an acceptance of Looker's testimony. (Gov't Br., p. 4, n. 4)

ent contention that Huck was prohibited from granting licenses under its lockbolt patents to others than Townsend by the alleged verbal agreement with Townsend, recognized . . . that Huck Manufacturing Company was free to grant such licenses." [17] (Fdg. 15, R. 710)

The District Court found that Huck kept its customers and Townsend advised by published price lists of the prices, terms and conditions of sale, established by Huck, of the patented lockbolts. (Fdg. 17, R. 711) It was found that Townsend "except for occasional deviations, observed and followed substantially the same prices, terms and conditions of sale established and observed by Huck for the sale of the patented lockbolts which Huck manufactured." [18] (Fdg. 18, R. 711)

The District Court did not find that there was any agreement or understanding between Huck and Townsend on prices, after the two-year period specified in the patent license which expired in September, 1956. Moreover, as to the licensee's role, the District Court found that: "There is no evidence in this case that the licensee Townsend was granted, or had, or exercised any power or authority to fix prices under Huck's lockbolt patents for Huck, the patent owner, or any other licensee under the Huck lockbolt patents to follow." [19] (Fdg. 19, R. 711) It found that

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[17] The court also found that Looker "initiated in the Department of Justice and pressed and followed up the action of the Department which culminated in the criminal action . . . and this present civil action." (R. 710)

[18] On several occasions, Townsend and Huck cut each other's prices and price terms in the post-1956 period. (R. 377-78; 381-82) An internal memorandum in the post-1956 period at Townsend forbade price collaboration with Huck. (Defs. Ex. EE, R. 694) (This antedated the start of Looker's correspondence with the Justice Department.)

[19] The trial court found that there had been certain contacts between Huck and Townsend but that these related to such matters

Townsend did not participate in Huck's refusals to license other companies, and that these refusals were made in the exercise of Huck's independent judgment. (Fdg. 22, R. 712-13)

The District Court also found that the patents covered in the basic license between Huck and Townsend were "conceded to be valid and subsisting and to cover lockbolts which Townsend has manufactured and sold and is presently manufacturing and selling under the license." (Fdg. 21, R. 712) Furthermore, the District Court found that there was no agreement that prevented or restrained Townsend in any way from developing and making and selling lockbolts that would be independent of and avoid Huck's patents. (Fdg. 24, R. 717)

The court also found that there had been no evidence that purchasers of the lockbolts were prevented or restrained from obtaining other fastening devices for like uses available and obtainable in the market at comparable prices. (Fdg. 26, R. 717) It found on the limited proofs in the record that "several types of fasteners other than lockbolts are used or usable for the same purposes as lockbolts." (Fdg. 9, R. 707)

Judge Machrowicz, like Judge Kaess, was moved to comment on the lack of economic evidence in the Government's case and the total absence of any effort to show a relevant market other than one defined simply in terms of the lockbolts covered by the patent claims. He found that while there was evidence "that there are fastening devices

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as interchangeability, quality control, and the exchange of technical information, and that the contacts "have been in furtherance of legitimate, normal business motives permissible under the patent license" and that they had "not been for the purpose of fixing prices." (Fdg. 20, R. 712)

other than the patented lockbolts which can be and are used for the same purposes and which are regarded as competitive with the patented lockbolts," there was no evidence in the record "to define the industry or market in which the patented lockbolts and other fastening devices available for the same purposes and uses are being sold, or to show its magnitude." (Fdg. 27, R. 717) Thus, the court found "there is no evidence from which the impact or effect of the combination and conspiracy alleged with respect to the patented lockbolts upon the market for the patented lockbolts and the other fastening devices used and usable for the same purposes can be evaluated or determined." (Fdg. 28, R. 717)

The court found that there was no evidence: "that Huck and Townsend had any intention to or did conspire to restrain or monopolize, or did restrain or monopolize, trade or commerce in lockbolts beyond the limits of the lawful patent monopoly granted to Huck as owner of the lockbolt patents," (Fdg. 29, R. 717) or that the arrangement between Huck and Townsend "was designed to or did secure to Huck other than a reasonable reward for the use of exclusive patent rights of which Huck was the owner by the grant to it of the lockbolt patents." (Fdg. 25, R. 717)

The District Court then discussed the applicable law and recited that: "The Government concedes that under the authority of the decision in *U. S.* v. *General Electric Co.*, 272 U. S. 476, the patent owner who manufactures and sells the patented articles can license another to make and sell the patented articles and require the licensee, with respect to the patented devices made and sold by the licensee under the licensor's patents, to observe and follow the licensor's prices, terms and conditions of sale." (R. 718)

After discussing the law, the District Court stated that: "I conclude upon the evidence submitted that the case at bar is in all material respects the same as and ruled by the decision in *U. S.* v. *General Electric Co.*, 272 U. S. 476, 489 . . . . " (R. 721) Accordingly, the court ordered that judgment be entered dismissing the complaint. (R. 722)

The posture on appeal.—The Government then filed a notice of appeal to this Court, abandoning its Section 2 contentions and raising issues only under Section 1. That notice, for the first time, purported to raise the following question: "Whether the decision in *United States* v. *General Electric Co.*, 272 U. S. 476, insofar as it holds that an agreement between a patent owner and its licensee that the licensee will sell the patented product only at prices established by the patentee does not violate Section 1 of the Sherman Act, should be overruled." (R. 723, 764)

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It should be observed at this point that Looker's testimony that despite the written terms of the license there was an oral agreement that the exclusive and price-restrictive features of the Huck-Townsend license would continue until 1967, when the basic patents expired—rather than when these features expired by their written terms in September, 1956—constitutes the sole evidentiary basis on which the Government is raising the issue as to whether *General Electric* should be overruled. If Looker's testimony as to the alleged oral agreement is not credited, the exclusiveness and price-restriction features ended nine years ago, and could hardly warrant an injunction in any event.[20]

As to existence of the oral agreement, neither the judge in the criminal case nor the court below made any finding;

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[20] See, *e.g.*, *United States* v. *Oregon State Medical Soc'y*, 343 U. S. 326, 334 (1952); *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84 (1925).

their approach was that even if the facts were as Looker testified, no violation of the Sherman Act was shown as a matter of law.[21] In neither case, of course, did the defense have any occasion to put on its proofs, since motions for acquittal or dismissal were granted after the Government's case.—It is an understatement to say that Looker's testimony raises a most serious issue of credibility, apparent even on the printed record, in view of his self-contradictions,[22] his obvious interest and bias (R. 261-69; 284-86), and the circumstantial evidence against his assertions.[23]

Accordingly, it is plain that should this Court, despite our contentions, hold either that it is appropriate to re-examine *General Electric,* and overrule it, or that the exclusivity feature allegedly present here was such as to take this case out of the rule of the *General Electric* decision, it would remain to be established on a remand whether in fact there existed the agreement to which Looker testified.

Since there are no enjoinable violations, even on the Government's view of the law, unless Looker's testimony is credited, we shall henceforth in this brief for the purposes of discussing the legal issues make the assumption that the Court below and Judge Kaess in the criminal trial made *ex hypothesi*: that there was an oral agreement that the parties would continue the price maintenance and exclusivity features of the license despite the fact that by their written terms they expired in September, 1956.

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[21] This was expressly stated in the findings of Judge Machrowicz in the civil case (Fdgs. 15, 16, R. 709-11) and implicit in Judge Kaess' action in granting appellees' motion to dismiss the criminal case after the Government's case, since he was sitting with a jury.

[22] See pp. 8-9, *supra.*

[23] See also Defs. Exs. R, S, V, BB, CC, R. 664-65, 668, 679-88; R. 277-83.

SUMMARY OF ARGUMENT

The *General Electric* rule, accommodating the policies of the patent laws and the antitrust laws, was the product of a unanimous decision by this Court thirty-nine years ago. It recognizes a limited privilege in the owner of a patent, manufacturing under it, to establish a licensed "second source" for the patented product, on a price-restricted basis. The courts have been quick to strike down any attempts to extend the privilege beyond these narrow limits, and have imposed a variety of safeguards to prevent abuses. The *General Electric* privilege has its greatest practical justification in the case of a small manufacturing concern holding patents, such as that presented here. On the present record, the Government is contending that the accommodation between the patent laws and the antitrust laws represented by the *General Electric* case and the decisions interpreting it should be overruled and the "second source" price-restrictive patent license henceforth be held a *per se* violation of the Sherman Act.

I. For a multitude of reasons, it would be hard to devise a more inappropriate case than the present one for this Court to consider the overruling of *General Electric*:

1. The Government expressly and repeatedly waived, in the court below, any intention to question the *General Electric* rule, and in fact after due consideration affirmed that the rule was "good law." It did not simply recognize that the District Court could not overrule the decision; it disclaimed any intent to use this case as an overruling vehicle. There is every reason to hold this waiver conclusive and to decline to relieve the Government of the consequences of it.

2. The appellees relied procedurally in the court below upon the Government's waiver of any attempt to lay a foundation for an attack on *General Electric*. They agreed to the receipt in evidence, as the Government's case in chief, of the transcript of a prior criminal proceeding against them—of course, likewise a proceeding in which the Government did not challenge *General Electric*. They moved for judgment after the Government's case without putting in any economic evidence in justification of the "second source" license involved here. Thus the Court is presented with a record, by reason of the Government's action, in which there is no evidence of the "economic and business stuff" from which arrangements of the sort in question emerge. See *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). Moreover, in reliance on the Government's waiver, the defendants permitted the receipt below of the transcript of the witness Looker's testimony, previously given in the criminal case, thereby permitting the civil trial to proceed without Looker's being observed by the trial judge. Unless Looker's testimony is credited, even if *General Electric* is overruled, there is no basis for any judgment at this point against appellees.

3. Inasmuch as the record presently before the Court consists solely of the Government's case—because the appellees' motions for judgment at the end of the Government's case, made in the light of the Government's disclaimer of any intent to challenge the *General Electric* rule, were granted—it would be inappropriate for the Court to relieve the Government of the consequences of its waiver and to use this case as a vehicle to consider overruling *General Electric*. If reconsideration of *General Electric* is appropriate at this point of time, it would be more suitable judicial administration to await a case presenting the record of a full trial.

4. The action of the Government in raising the question of the overruling of *General Electric* for the first time on appeal to this Court, without a proper record directed to the issues which the Government is now pressing on this Court, is an abuse of the direct appeal provisions of the Expediting Act.

5. Not only is this case presently in no posture for appropriate consideration of the overruling of the *General Electric* decision, but in all probability it will never be in procedurally appropriate form for such consideration. This is because the basic lockbolt patents licensed by Huck to Townsend have only about two years to run. It is doubtful whether, if the cause is remanded for the building of an appropriate record on the new issues tendered by the Government, such a record could be made, the proceedings in the District Court completed, and an appeal reperfected to this Court before the patents in question expire. This circumstance confirms the procedural inappropriateness of this case as a vehicle for reconsideration of the overruling of *General Electric*.

6. Finally, the abstractness of the issue as to whether *General Electric* should be overruled is made even more evident by the fact that the District Court never made any finding that there was an arrangement between the parties here, of the sort which the *General Electric* rule sanctions, at any date subsequent to September, 1956. Again, this circumstance counsels against relieving the Government from the normal consequences of its waiver; were the Government to be relieved from it, the only result might be for this Court to render an advisory opinion.

II. These manifold procedural failings have naturally led to severe substantive gaps in the record, which confirm the inappropriateness of this case as a vehicle for the reconsideration of the *General Electric* rule.

A. Thus, there is no proof in the record, in the context of the fastener industry or any other industry, as to such issues as: The public advantages of having a licensed second source for patented items, albeit subject to a price restriction; the extent to which patentees would choose not to license at all rather than to license other than on a price-restricted basis; the increase in economically undesirable forms of licensing which would attend the abolition of the price-restricted "second source" license; the extent to which industry-wide licensing on a pure royalty basis would supersede price-restrictive "second source" licensing, and the adverse economic and competitive consequences that would attend this result; the effect of the abolition of the price-restricted "second source" license on small business concerns, and the net competitive cost of its abolition in terms of increased economic concentration; the adverse consequences of the increased outright sale or assignment of patents by their owners, as an alternative to "second source" price-restrictive licensing; the adverse economic consequences of exclusive self-production by a patentee; or, the extent to which price-restricted "second source" licensing is availed of by smaller producers and tends to provide for more balanced competition between producers of rival products. Certainly before the Government seeks an overruling of *General Electric* it should endeavor to present to this Court a record at least serving as an object lesson on these questions in the relevant industry to which the case relates.

B. Because of the nature of the record, the Government's affirmative arguments in favor of overruling *General Electric* amount to pure conjecture, assertion and speculation; thin reeds on which to overrule a precedent which has stood for thirty-nine years. The more serious arguments made against the *General Electric* rule by the Government are met by the limitations which the courts have been conscientious in applying to prevent abuses of the *General Electric* privilege, notably by preventing it from being used as part of industry-wide price-fixing patterns through multiple licensing schemes. These abuses are not inherent in the case of a single "second source" license, such as is involved here. The present case presents a situation in which the *General Electric* rule has its greatest practical justification and is susceptible of the most minimal abuse. It counsels against imposing a *per se* rule here. There is no reason shown on this record for departing from the present approach whereby each case of a price-restrictive second source license is judged on its own facts, according to the strict judicial precedents, to determine whether there has been any abuse of the *General Electric* privilege.

There is a serious question as to whether at this juncture the reconsideration of *General Electric* is not a matter more appropriate for Congress than for the courts. But in any event, consideration of overruling it should await a proper record.

III. The pragmatic reasons advanced by the Government for departing from *stare decisis* and overruling *General Electric* are without substance.

1. It is not true that the *General Electric* rule has been so restricted as to afford no benefit to the business

community. Although judicial prevention of abuses may have rendered the rule of little use to the giant industrial concern, it remains of considerable value to the smaller company with limited production capabilities.

2. The *General Electric* rule, at the present time, is not productive of a vast area of uncertainty. The course of adjudication has resolved virtually all of the serious questions as to the rule's applicability, and has resolved them in favor of strict limitation of the privilege. Thus, there is no need, as the Government suggests, to extirpate the rule as a radical cure for any uncertainty.

3. The fact that the rule is presently creating no embarrassment to the effective administration of the antitrust laws is reinforced by the fact that, despite the direct appeal provisions of the Expediting Act, no case presenting a substantial legal question as to the rule's applicability has come before this Court for fifteen years. In fact, in the last decade there have been commenced only three Government antitrust suits attacking abuses of the *General Electric* privilege. Here, again, the need for radical surgery suggested by the Government is overdrawn, and it is strongly suggested that the Government is attempting to foist a purely academic question upon this Court for decision.

IV. The arrangements suggested on the present record are permitted by the *General Electric* rule. Even the Government's proofs do not indicate anything other than a "second source" patent license with an exclusivity feature and a price-maintenance clause, for the life of the basic Huck patents. While the exclusivity feature itself was not found in the *General Electric* case, it is certainly central

to the patentee's statutory powers to exclude whomever he wishes from the practice of his invention. Moreover, an exclusivity feature affords assurance that the price-restrictive patent license will not be extended on an industry-wide basis, and thus raise a serious question of violation of the Sherman Act. Whether a patent license with an exclusivity feature and a price-restrictive clause might possibly amount to a violation of the Sherman Act, under circumstances of the domination of the relevant product market by the patentee and the exclusive licensee, is a question not presented by the present record. The Government's contention on this point thus amounts to no more than a subsidiary of its central point that *General Electric* should be overruled on the present record, and must stand or fall with it.

ARGUMENT

INTRODUCTION

In *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), a unanimous Supreme Court upheld the validity, against challenge by the United States in a suit under the Sherman Act, of a clause in a patent license running from General Electric Company to Westinghouse Electric Company whereby Westinghouse agreed to maintain General Electric's price on the patented light bulbs manufactured and sold by it under the license. The Court recognized the obvious fact that the object of the patent laws is monopoly, granted to stimulate the making of inventions. 272 U. S., at 491. For the Court, the decisive question was whether the price-restrictive clause was "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." (272 U. S., at 490) Recognizing that realization of profit through the selling price of the patented goods was a central part of the statutory reward to

the patentee, Chief Justice Taft answered the question for the Court as follows:

> "One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself.'"

Since the *General Electric* decision, this Court has made it clear that the privilege which it recognizes is one with sharp and strict limitations. Thus, the Court has underscored that a scheme involving the grant of multiple licenses may not be used to "regiment an entire industry by licenses containing price-fixing agreements." *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), 340 U. S. 76 (1950),[24] as summarized in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143 (1948); *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371 (1952).[25] These holdings have, in fact, led one Court of Appeals to hold that any price-restrictive license which is adhered to by more than one licensee amounts to a *per se* violation

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[24] In *Gypsum* the licensees urged the rest of the industry to accept similar price-restrictive licenses. 333 U. S., at 378-82.

[25] In *New Wrinkle*, twelve of the industry members subscribed to price-restrictive licenses issued by a patent "pool" corporation.

of the Sherman Act. *Newburgh Moire Co.* v. *Superior Moire Co.*, 237 F. 2d 283 (3d Cir. 1956).[26]

Various other decisions of the courts illustrate the strict limitations on the *General Electric* privilege. Thus, the price-restriction clause cannot be used in respect of cross-licensed patents, or of pooled patents. *United States* v. *Line Material Co.*, 333 U. S. 287 (1948); *United States* v. *New Wrinkle, Inc., supra.* And it has long been the rule that the price-restriction clause may not cover sales made by others than the licensee; for example, it may not be used as a basis for resale price maintenance. See, *e.g., Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912); *United States* v. *General Electric Co., supra,* at 485-90; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940).

Moreover, it has been made clear through a line of cases in the lower courts that the *General Electric* doctrine permits use of a price restriction only where the patent covers the end item itself which is to be subjected to the restriction, not in cases where, for example, the patent covers only the process of its manufacture. See, *e.g., Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 142 F. 2d 646 (5th Cir. 1944), *cert. denied*, 323 U. S. 726 (1944); *Barber-*

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[26] We must observe that the ruling in the *Newburgh* case was quite unnecessary to the result because the patentee there had, as the District Court's opinion makes clear, engaged in a practice which the cases denounce as an abuse of the *General Electric* privilege and hold to be unlawful. See *Newburgh Moire Co.* v. *Superior Moire Co.*, 105 F. Supp. 372, 374 (D. N. J. 1952). The patentee in the *Newburgh* case, as the cited passage indicates, undertook to restrict the prices of the unpatented finished items sold by its licensees under a process patent license. The law was quite settled by the time of the *Newburgh* case that this practice was not permissible. See pp. 26-27 and pp. 71-72, *infra.*

Colman Co. v. *National Tool Co.*, 136 F. 2d 339 (6th Cir. 1943). It is also held that the price-restriction privilege exists only where the patentee is himself manufacturing the patented item. *United States* v. *Vehicular Parking, Ltd.*, 54 F. Supp. 828, 838 (D. Del. 1944).

Furthermore, where such a price restriction of the sort permitted by *General Electric* is included in a patent license, it is held that—despite any stipulation to the contrary—the licensee may challenge the validity of the patent covered by the license, and if successful, avoid the agreement. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942). And it is always open to the United States, in an antitrust suit, to attack the validity of the patents involved. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 387-88 (1948).

This Court recently reaffirmed that: "The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*." *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 24 (1964). Both these laws are economic devices, adopted by Congress to achieve certain economic goals. As the cases cited demonstrate, the balance between the antitrust laws and the patent laws represented by *General Electric* and subsequent cases is one which has been carefully and delicately struck. The Courts have been quick to invoke the Sherman Act to prevent any abuse of the limited privilege of the patent owner recognized by the *General Electric* case.[27]

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[27] "Logical" arguments, derived from the nature of the patent monopoly or of the antitrust laws, have not been, of course, the determinants in striking this accommodation. (See our discussion below, pp. 55-62, as to the abstract arguments of the Government's brief.) As a distinguished commentator on the relationship between the patent laws and the antitrust laws recently said of the accom-

The present case, as even this limited record indicates, presents the very circumstance in which the *General Electric* privilege has its greatest practical justification: the case of the small inventor with a small, closely-held family corporation, who wishes to admit a second source to the practice of his invention while at the same time retaining some of the fruits of manufacture himself.—And it often is the case that manufacture of the invented device furnishes the inventor's primary reward. Edison declared that: "I have made money through the introduction and sale of my products as a manufacturer, not as an inventor." [28]

It may well be that the *General Electric* doctrine, with the necessary limits the cases have put on it, would today prove of little utility to modern industrial units of the size of the General Electric Company and of Westinghouse Electric Company. But it is hard to see how the continuation of the narrow privilege for a small inventor, not shown to be dominant in any field broader than that encompassed by the claims of his patent, and for his single second-source licensee, could seriously be thought to pose a threat to the preservation of competition; and in fact, to the ex-

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modation between those laws that has been reached: "It is important to recognize this accommodation for what it is: a policy decision by the courts that here they stand, instead of permitting more or less. They could have contained the patent monopoly more narrowly. Or they could have extended the area of permissible restrictions. For instance, they could logically have permitted more extensive control over the unpatented products of patented processes or machines, tie-in arrangements, more extensive price restrictions, control over patented articles in the hands of successive purchasers, greater control over competition between multiple licensees, and so on." Stedman, "Legal Problems in the International and Domestic Licensing of Know-How," Address before Section Meeting of the American Bar Association, Miami, August 8, 1965, p. 4.

[28] Crawford, *Patents, Profits and Pirates; An Interview with Thomas A. Edison,* Saturday Evening Post, Sept. 27, 1930, p. 4.

tent it permits him to survive as a producer, it promotes competition.

Despite these factors, in the present case, for the first time in seventeen years, the United States has chosen to attack the continuing validity of the rule of the *General Electric* case, even in the carefully limited applications sanctioned by the decisions of this Court. For this case involves a single patent license grant—a "second-source" license—simply containing a first resale price-restrictive clause—the very sort of arrangement sanctioned by the Court in *General Electric.* As in *General Electric,* no challenge to the validity of the basic patents involved in the license here has been made by the Government.—The strength of these patents has been demonstrated by the fact that they were upheld in their only judicial test, that they have been the subject of numerous licensing requests by others than Townsend, and that apparently no one has risked infringement of the patents since the early 1950's.

What the Government is contending—as it must, since it has introduced no economic evidence to suggest or support an intermediate approach—is that not only should *General Electric* be overruled, but that the use of a single patent license with a price-restrictive clause, sanctioned by *General Electric,* should be henceforth held to be a *per se* violation of the Sherman Act. Overruling the *General Electric* case and imposing a *per se* rule here would destroy the accommodation that has been built, through a course of decisions over a period of almost forty years, between the lawful statutory monopoly of the patent owner and the general commands of the antitrust laws. We submit that on the present record there is no basis for the Court to determine that a *per se* rule should be imposed here—for considerations of administrative convenience or other-

wise—in place of the continuation of the case-by-case approach, by which the courts determine whether the patent owner has overstepped the statutory privileges bestowed upon him under the patent laws.

I. THIS CASE IS PROCEDURALLY INAPPROPRIATE FOR A RECONSIDERATION OF THE *GENERAL ELECTRIC* RULE

It would be hard to devise a more inappropriate case than this one for this Court to consider the overruling of the *General Electric* case. The present case is the civil side of simultaneous criminal and civil proceedings brought by the Justice Department after repeated complaints by the disgruntled stepson of the founder of Huck Manufacturing Company who left Huck in 1956 and became President of another concern. The two cases were tried before different judges and each resulted in a dismissal of the charges at the close of the Government's case. In neither the civil nor the criminal proceedings did the Government indicate that it was questioning the *General Electric* doctrine and bringing a case to form the basis for the overruling of that doctrine in the appropriate forum. In fact, the Government affirmatively, after due study of the matter, reported to the court and the parties that *General Electric* was "good law" and that it was not attempting to have it overruled; thereby the Government foreclosed the development of a record on which an intelligent determination could be made as to whether there should be an overruling. Contrast *United States* v. *Line Material Co.*, 333 U. S. 287 (1948).[29]

[29] In the *Line Material* case, the Government made plain its view in the District Court that *General Electric* was not good law and had been erroneously decided. On the basis of this, the District Court was able to analyze the record and make findings of a nature which would have been of relevance had the Supreme Court determined to overrule *General Electric*. See 64 F. Supp. 970, 976, 977 (E. D. Wis. 1946).

In detail, the procedural deficiencies in the present case, considered as a vehicle for this Court's consideration of whether the rule of the *General Electric* case remains a sound accommodation of the antitrust laws and the patent laws, are the following:

1. *The Government's Waiver.*—The Government, in the trial of the civil case, expressly and repeatedly waived any intention to question the *General Electric* rule. This waiver took the form of express statements on the record at pretrial conferences, which were embodied in a Pretrial Order (R. 767-68); it was confirmed by repeated statements by the Government that the issue in the case was whether the facts fell outside the rule of the *General Electric* decision. These statements, which did not in any fashion reveal any intent to question the rule of the *General Electric* case, were contained in a letter to the court by the then Assistant Attorney General outlining the Government's position (R. 779-81), in the Government's brief on the appellees' motion for judgment under Rule 41(b) (Gov't Tr. Br., p. 50), and in oral argument on that motion. (R. 697-99)

It was on the basis of this express waiver that the issues were formulated at pretrial, and on this basis that the parties agreed at the instance of the Government that the record of the evidence at the criminal trial, which had been first held, would be received in evidence as the Government's whole case in chief in the civil trial. It was in the light of this waiver that the defense moved for judgment under Rule 41 at the close of the Government's case.

Under the Federal Rules of Civil Procedure, the issues formulated in the pretrial orders govern the entire subsequent course of the action.[30] In the light of the issues

[30] Rule 16 provides that a pretrial order: "when entered controls the subsequent course of the action, unless modified at the trial to

formulated below, to permit the Government to inject at this stage the issue of overruling the *General Electric* case would be to eviscerate the careful pretrial procedures followed in the court below. If the appellees were not justified in relying here on the express waiver by the Government of any intent to question *General Electric,* it is hard to conceive that any party may ever safely rely on any pretrial order.

The Government's waiver of any intent to question the *General Electric* case was just that. It did not amount, in form or substance, simply to a bit of gratuitous advice to the District Judge that he could not himself overrule Supreme Court decisions. It was, rather, a notice served on the lower court and on the defense that the issues in the case were to be framed, and the record shaped, on the assumption that the *General Electric* case was good law and was not going to be challenged. Numerous appellate cases—including decisions of this Court—hold such a waiver conclusive against injection of the waived issue on appeal,[31] and application of their principle is very much warranted in this case.

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prevent manifest injustice." The cases consistently follow the clear intent of this rule. See, *e.g., United States* v. *Fallbrook Public Utilities District,* 165 F. Supp. 806 (S. D. Cal. 1958); *United States* v. *Shubert,* 15 F. R. Serv. 33.333, Case 1 (S. D. N. Y. 1951); *United States* v. *E. I. du Pont de Nemours & Co.,* 11 F. R. D. 308 (D. Del. 1951); *Sinclair Refining Co.* v. *Howell,* 222 F. 2d 637 (5th Cir. 1955); *Fowler* v. *Crown-Zellerbach Corp.,* 163 F. 2d 773 (9th Cir. 1947).

[31] See, *e.g., Giordenello* v. *United States,* 357 U. S. 480, 488 (1958); *Helvering* v. *Cement Investors, Inc.,* 316 U. S. 527, 535 (1942); *Virginian R. Co.* v. *Mullens,* 271 U. S. 220, 227 (1926); *Duignen* v. *United States,* 274 U. S. 195, 200 (1927). We would point out that in the first two cases cited, failure to raise the issue below was held conclusive against the Government; and that in none of the cases cited, and rarely in any of the cases, is there found a waiver as express and explicit as that involved here.

2. *Conduct of the Case on the Basis of the Waiver.*—The appellees then conducted their defense in reliance upon this framing of the issues in which the Government had waived any attempt to lay the foundation for an attack on *General Electric.* The defense agreed to the Government's request that there be received in evidence as the Government's proof in the civil case the transcript of the Government's case-in-chief in the criminal prosecution.

It is undisputed that the Government did not seek the overruling of the *General Electric* case in the criminal proceeding. In fact, it scarcely could have if it had wanted to; criminal pains and penalties could hardly have been called down upon conduct which was within the scope of behavior held lawful by an existing Supreme Court decision. The record of the criminal case, then, which constitutes the entire evidentiary record of this case, is completely void of the sort of material which could lead to an informed decision on the question whether the *General Electric* case should be overruled. The direct evidence of the Government was not pointed at this issue; and neither was the cross-examination by the appellees, or the exhibits they introduced.

Consistent with the Government's waiver of any intent to question *General Electric,* the introduction of economic evidence had been resolutely objected to by the Government in connection with the criminal trial.[32] (R. 366) Of

[32] In granting the motions for judgment of acquittal in the criminal case Judge Kaess stated that: "[The Government] has indicated that it does not consider the problem of defining the relevant market to be part of its case, or even part of the defendants' case. . . . Indeed, if the Court understands the Government's position correctly, it would foreclose the defendants from attempting any proof that the arrangement was justified on economic grounds While the Government has shown that the sale of the product forms some appreciable part of interstate commerce, it has declined to inform the court and the jury what positions are held by the defendants in their industry." 214 F. Supp., at 777-78.

course, the Government itself presented no evidence on economic issues in the criminal trial. There was not even any attempt to define a relevant market, with the result that the civil court's dismissal of the Government's Section 2 charges has not even been questioned on this appeal. Evidence of the "economic and business stuff out of which these arrangements emerge"—and of the alternatives to them[33]—is essential to the resolution of the question whether the single "second-source" price-restrictive patent license—sanctioned in *General Electric*—should now be held a *per se* violation of the Sherman Act. *White Motor Co. v. United States*, 372 U. S. 253, 263 (1963).[34] Without this sort of record, there is no basis on which the Court could conclude that the "second source" license should be a new *per se* violation of the Act.

Not only is the record devoid of economic evidence or other evidentiary materials on which to reach an informed judgment as to whether the *General Electric* decision should be overruled, but the Government's waiver of any intent to challenge *General Electric* led the defense

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[33] The Government contended that "any evidence introduced in order to delineate a 'relevant product market' in this case or evidence tending to show that there are products which may substitute for lockbolts or which are interchangeable with them is irrelevant, hence inadmissible." (Gov't memo of law, Feb. 21, 1963, pp. 1-2)

[34] In *White Motor*, the Court said as to the particular practice there claimed by the Government to be a new *per se* violation: "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a smaller company has for breaking into or staying in business . . . and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtues' [citing *Northern Pac. R. Co. v. United States*, 356 U. S. 1, 5 (1958)] and therefore should be classified as *per se* violations of the Sherman Act." 372 U. S., at 263.

into a material concession as to the proof of the basic historical facts as to what had happened between Huck and Townsend. Since the Government was not reserving the right to seek an overruling of *General Electric,* it made little difference whether or not the trial judge in the civil case had the opportunity to observe the witness Looker on the stand. Whether he was believed or not by the trial judge in his story that the parties had agreed to provide price restriction and exclusivity features for a period beyond September 1956 was immaterial because, in any event, that conduct did not violate the law as expressed in *General Electric.* Had the defense any notice that any material consequences turned on whether Looker's story was believed or not, it scarcely would have stipulated that the record of the criminal proceeding be received in evidence in the District Court, thereby depriving Judge Machrowicz of the opportunity to observe Looker on the stand.[35]

3. *Only Half a Case.*—The two cases were each tried solely on the basis that the defendants' conduct went beyond the scope of the conduct permitted by the *General Electric* doctrine.[36] In each case there was an abject failure

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[35] The Government suggests that Judge Kaess who sat in the criminal trial found that Looker's testimony was credible. It infers this from Judge Kaess' recital that the oral agreement was proved "prima facie." (214 F. Supp., at 777; Gov't Br., p. 8, n. 5) But the Government's brief neglects to inform the Court of the fact that Judge Kaess was sitting with a jury. (R. 18) Obviously, on a motion for acquittal addressed to him at the conclusion of the Government's case he could not resolve any issue of credibility, as that was for the jury. He had to accept Looker's testimony as true, and even on that basis granted the motion for acquittal. That is all that the language in question in his opinion means or could mean.

[36] The Government contended in the civil case that the case went outside the *General Electric* rule (1) because of the exclusive fea-

of proof of any such conduct. As a result of this, in neither case was the defendants' evidence put in the record. Since *General Electric* was not in issue, the defense moved for judgment in each case at the close of the Government's case, and of course in the light of the issues framed the motions were granted.

This circumstance itself is a powerful reason why the Court should not accept the Government's invitation to make this case an occasion for considering the overruling of the *General Electric* rule. Such an occasion would certainly be better presented by a case in which both sides had put in their proof (let alone one in which the *General Electric* rule has been put in issue), rather than one in which the Court would be called upon to decide the questions presented on the basis of only one party's record, and where the findings of the District Court are simply findings as to whether the Government's case, taken by itself, established certain facts by a preponderance of the evidence.[37] *Cf. White Motor Co.* v. *United States, supra.*

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ture in the written license and the alleged oral agreement; (2) because of certain alleged participation by Townsend in fixing prices under the license; and (3) because of the provision for cross-licensing of Townsend's improvements contained in the licenses. (Gov't Trial Br., pp. 50-51) As we shall develop, the exclusive feature is irrelevant to the matter, and in fact provides an assurance that the limitations on the *General Electric* rule will not be transgressed. The Government's points as to delegation of power to fix prices and as to the significance of the cross-licensing are not being pursued in this Court.

[37] In fact, as to the evidence of Looker as to the oral agreement—essential to the Government's case—the District Court did not even make any finding other than that Looker had testified to the agreement. (Fdg. 15, R. 709) This was because under the *General Electric* doctrine the duration of the price-restriction clause was not material.

4. *Abuse of the Expediting Act.*—In *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 175 (1963), this Court declared that the provisions of the Expediting Act providing for direct appeals from the district courts in Government civil antitrust cases were unsatisfactory, not only from the standpoint of the burden on this Court, but because they deprive the Court of the record-sifting functions of the Courts of Appeals. Here the Government is compounding the burdens of the Expediting Act by asking this Court to consider the overruling of the *General Electric* case not only in a case where there is no opinion of a Court of Appeals, but where there is no record in or opinion of the District Court addressed to the issue, and where there is not even any case on behalf of the defense or any findings of the District Court made after the consideration of all the evidence.

Of course, the Court must continue to hear appeals under the Expediting Act unless and until it is repealed and accordingly has noted probable jurisdiction here. But of a certainty it has a discretion to determine which records brought directly to it from the district courts under the Act are suitable vehicles for the reconsideration of its established precedents involving important legal issues. This is particularly the case where that reconsideration is dependent upon the Court's taking the extraordinary step of relieving the Government from the usual consequences of the repeated express waiver which it made below. There are problems enough in the Expediting Act without its being used as a vehicle to enlarge the original jurisdiction of this Court.

5. *Incipient Mootness.*—Moreover—even apart from the unfairness of such a course—there would be scant point in this case even for a remand to the District Court to permit

the Government to put in proof relevant to the validity of *General Electric* and to permit appellees to withdraw their acquiescence in the stipulation and to put in their defense, in order to make a complete record.

This is because the case is in a state of at least incipient mootness in terms of its ever being a suitable case for reconsideration of the *General Electric* doctrine. The basic patents owned by Huck, which form the basis for the license to Townsend with the price-restriction clause now attacked by the Government, will expire in November, 1967.[38] It is highly doubtful whether, if a remand were made, there could be conducted the necessary discovery incident to putting in the defense (as well as the Government's proofs) on the broader issues now raised by the Government, the retrial in the District Court could be completed, and the appeal to this Court could be reperfected and argued, before the patents expire. As this Court has frequently stressed, while it "decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180, 184 (1959).

While the basic second-source license in question also covers certain patents on improvements and lockbolt equipment made by Huck, it is purely conjectural to assume that industry conditions in the manufacture of lockbolts would not be materially changed when the basic patents on them expire.—Obviously, it is much easier to design around improvement patents and produce a noninfringing device once the basic patent in a field of art falls into the public domain. The market structure of the sale of lockbolts thus may well be dramatically changed once the basic Huck patents expire.

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[38] The basic patents are Nos. 2,531,048 and 2,531,049, both granted November 21, 1950. (R. 469)

Accordingly, proofs taken upon any remand will almost certainly be out of date before any further appeal is considered by the Court. Since this case would either become moot or drastically changed at the expiration of the basic patents in 1967, it is clear that for this reason again it furnishes an inappropriate vehicle for the reexamination of the *General Electric* doctrine. Accordingly the Government should be held to its waiver and the judgment below should be affirmed without reexamination of that doctrine.

6. *Likelihood of a Purely Advisory Opinion.*—Finally, not only is the case in a state of at least incipient mootness because the basic patents involved will soon expire, but the case—unless the alleged oral agreement testified to by Looker is credited—involves a restriction which has long since expired. The terms of the license (GX 17, R. 472) provided that the license would be exclusive, and Huck's prices maintained by Townsend, only until September, 1956. Unless Looker's testimony is believed, the case involves a practice which was discontinued nine years ago and which would not, even if *General Electric* were overruled, be an appropriate object of injunctive relief.—The District Court did not make any finding that there was any oral agreement to continue the exclusive feature and the price-restriction features of the license after the expiration of the two-year period provided for them in the written agreement.

Accordingly, even if *General Electric* were to be overruled, the grant of an injunction in this case would depend upon the resolution of this factual issue, after the appellees put in their case upon a remand in the court below. On any such remand, the appellees might well withdraw from the stipulation and request that the Government be required to put on its proofs in open court. The District Court might well find on the basis of a full record that no such agreement as that to which Looker testified existed.

Certainly this circumstanee adds to the abstractness of the very serious question which the Government is attempting to introduce into the appellate stage of this case, and furnishes a further reason why this Court should not take the extraordinary step of permitting the Government to raise the question of the validity of *General Electric* for the first time on appeal. In the absence of a finding that Looker's story was true, this Court is being called upon to render what is essentially an advisory opinion.

II. THE RECORD OF THIS CASE CANNOT SUPPORT AN INFORMED JUDGMENT THAT *GENERAL ELECTRIC* SHOULD BE OVERRULED

These manifold procedural failings in this case—from the standpoint of its being a vehicle for the reconsideration of *General Electric*—have led, as naturally they must, to severe substantive gaps in the record which confirm the inappropriateness of this case as such a vehicle.

A. The Record does not Afford a Basis for Resolution of the Issues which must be Resolved Before a Decision to Overrule *General Electric* Could be Made.

The issue whether the *General Electric* decision should be overruled is not, as the Government would appear to believe by tendering it to the Court on this record, a law school examination question to be answered on the basis of a purely speculative analysis. Rather it is an economic question of the greatest seriousness. We question—in terms of the appropriateness of this case serving as a basis for the reexamination of the *General Electric* case—whether the fastener industry could present an adequate case study of the various economic issues involved. But,

in any event, except for that fortuitously put in, directed at other issues, the record is totally devoid of proof—either in terms of the lockbolt and metal fastener industry or of the economy generally—on the following questions, resolution of which would be essential to any informed decision as to whether the *General Electric* case should be overruled:

(1) *Public advantages in the existence of a second source.—What are the public advantages of having a licensed second source for a patented item, albeit subject to a price restriction, and to what extent would patentees choose not to license at all rather than to license other than on a price-restricted basis?*—Apart from the clear proof of Huck's manifest reluctance to license Townsend other than on a price-restricted basis, the present record offers no indication as to what the incidence of patentees choosing not to license at all would be if the *General Electric* case were overruled. The effects on the economy of not having a second source for patented items in these situations may well be significant. While by definition not offering price competition, second sources under a *General Electric* license offer increased production capacity, a broader procurement base for essential Government contracts,[39] and protection to the public against the effects of work stoppages on a single source caused by labor problems, natural disasters and the like.[40]

It must be remembered that the industry in which the lockbolt finds its greatest market is the manufacture of

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[39] Here the Government desired a second source for lockbolts; and if one was not licensed it could procure from an infringer and remit Huck to its remedies under §1498 of the Judicial Code. (R. 516)

[40] Fearing this, and desiring prompter delivery, Huck's large commercial customers pressured it to establish a second source. (R. 56, 58, 293)

aircraft. To the extent that other forms of fasteners might not be suitable in these applications—a question on which, again, the record is incomplete[41]—the importance of having a "second source" for these items is underscored by the present record; for the production of aircraft has been an activity essential to the national defense, and the commercial production of airframes is a major domestic industry with a very broad and important export trade.

Therefore, in this context, it appears that: "Licensing assures that companies which may be better equipped than the patentee to serve a market will have an opportunity to do so. It also readies a number of additional sources of supply for the period after the patent expires or in event of emergency. Thus, licensing may serve to encourage maximum volume and to dilute monopoly control." Harris & Siegel, *Evolving Court Opinion on Patent Licensing,* 5 Patent, Trademark and Copyright J. 103, 110-11 (1961).

Thus, it appears a very realistic position that prohibition of the *General Electric* "second source" price-restrictive license might well intensify the monopoly inherent in the patent laws, rather than alleviate it, by discouraging the creation of "second sources."

Moreover, a price-restricted second source may provide competition to the patent owner in speed of delivery, or in service; or it might compete in developing complementary products to the patented device or in innovating

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[41] The complaint (Paras. 8, 9, 10, R. 3) charged that there was a superiority inherent in lockbolts that in many cases precluded competition from other fasteners; but no evidence was tendered on these points and, despite its complaint, the Government insisted at trial that evidence as to substitutes was irrelevant. (R. 366) See also n. 33, p. 34, *supra.*

improvements in the patented device.[42] See Kareken, *Antitrust and the Exploitation of Patents,* 8 Patent, Trademark & Copyright J. 107, 109 (1964). There is obviously some public benefit to be obtained from all these competitive functions of the second source. *Cf.* McCarthy, *A Patent Licensing Policy for Minimizing Antitrust and Misuse Risks,* 46 J. P. O. S. 547, 550 (1964); Note, 55 Mich. L. Rev. 726, 727 (1957).

Furthermore, the grant of a "second source" patent license lays the foundation for vigorous competition in all respects—including price—at the expiration of the patent, by assuring that the patentee will not be alone in having a highly developed technology and established production and distribution facilities for the patented product. To the extent that the rule of the *General Electric* case encourages "second source" licensing, it helps further the purpose of the antitrust laws by preventing the patent monopoly from being used to achieve a monopolistic position in the industry for the patentee after the patent grant expires.[43] *Cf. Brulotte* v. *Thys Co.,* 379 U. S. 29 (1964). See Note, *Patent Price Restrictions and the*

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[42] Here one of the reasons which motivated Huck to license Townsend was its desire to have a secondary source available to develop lockbolt installing tools and to expand their production. (R. 504)

[43] Thus, in the present case, even if the testimony of Looker is believed, there will soon be a situation in which, at the expiry of the basic patents, both Huck and Townsend will be established firms in the lockbolt industry and in a position to compete with each other in all respects, including price. Had Huck not licensed its patents it might well have been that at the expiry of the basic patent it would have been so far ahead in this field as to have a continuing monopoly position for years after the patents expired.

Antitrust Laws: A Balance Upset, 67 Yale L. J. 700, 711-12 (1958); Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws*, 51 Va. L. Rev. 273, 277-78 (1965).[44] This is certainly an important competitive consideration. Some commentators view the ability of the patentee to dominate the market after expiration of his patent to be, in antitrust terms, "the most important kind of interaction between patents and more generally based market power." Kaysen & Turner, *Antitrust Policy* (1959), pp. 166-67. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 422, 430-31 (2d Cir. 1945) (Alcoa's monopoly stemmed from a patent which expired in 1909).

The record is, because of the Government's waiver below, barren of evidence on which the advantages to the public in terms of competition from having a second source can be evaluated, or as to the extent to which they would be lost if patentees were forced to the decision whether to license without a price restriction or not to license at all.

Moreover, the record is equally deficient in failing to provide a full development of the extent to which, in an economy characterized by the presence of large buyers—like the members of the automotive and airframe industries—"second sources" for component items are demanded by these giant customers. Such an inquiry might well indicate that the availability of price-restrictive "second source" patent licensing is an essential device to maintain some semblance of bargaining equality between the small component supplier who has introduced a patented product and his customers.—But as to this point too, except for the evidence of the demands of Douglas Aircraft Company (R. 56, 58, 293), the present record is silent.

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[44] While Professor Gibbons opposes the *General Electric* rule, he recognizes this justification for it.

(2) *Possibility of resort to other forms of licensing.—To what extent would overruling General Electric cause an increase in forms of licenses which, while perhaps unexceptionable from an antitrust standpoint, would have unfortunate economic consequences?*—Obviously the resolution of this question is an important consideration in passing on the continued validity of *General Electric*, but the present record offers no basis for an intelligent decision on it. For example, the extent to which royalties would be consequently increased in amount—thereby tending to create the same sort of price rigidity against which the Government presumably is contending—is incapable of resolution on the present record.

Furthermore, an overruling of the *General Electric* case might well cause even those patentees who desire a second manufacturing source not to grant an unrestricted license on a royalty basis to the second source to "manufacture," "use," and "sell" the patented devices, but only a license to "manufacture" them—the courts having uniformly held that patent licenses may be granted in respect of any of the three branches of the patent grant.[45] Thus, second sources might well be reduced, by an overruling of the *General Electric* case, from the status of independent marketers, having their own distribution systems and customer contacts with respect to sale of the patented items—albeit subject to the price restriction—to the status of the owners of contract production plants, whose output is taken up under contract and sold by the patentee.[46]—The present record offers no basis on which the Court could make an intel-

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[45] See, *e.g.*, *Adams* v. *Burks*, 17 Wall. 453, 456 (1873); *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 24 (1964).

[46] Even on the present record, it is suggested that certain of the patented lockbolts (in large sizes) were fabricated by Republic Steel Corporation on a "subcontract" basis for Huck. (R. 104-05)

ligent judgment of the feasibility of this possible approach by patentees if *General Electric* is overruled, or of its consequences.

(3) *Interproduct competition and industry-wide licensing.—To what extent, if the single "second source" license with a price-restrictive clause involved here were outlawed, would patentees instead engage in industry-wide patent licensing on a royalty basis, and to what extent would this have anticompetitive consequences?*—While the Government denounces the exclusive feature of the license involved here, an industry-wide license on a royalty basis even without a price restriction might remove all incentive to develop new forms of fasteners which might be superior to the lockbolts in question here.

Certainly, outlawing of the "second source" price-restrictive license involved here is apt—as the Government admits, and in fact presents as a desirable alternative (Gov't Br., pp. 24-25; J. S., pp. 14-15)—to lead to widespread licensing on a simple royalty basis. Of course, in this situation the patentee would be encouraged to maximize his royalties through industry-wide licensing. But the conclusion is far from clear—and the present record offers no clue to solution of the question—that such a result would tend to stimulate rather than suppress competition.[47] For a licensee who has accepted a license for a patented product may well, because of his investment in special facilities and tooling, as well as in advertising

[47] Indeed, even an opponent of the *General Electric* rule has observed: "Most advocates of the abolition of price restrictions assume that the restraints prevent licensees from competing. The importance of this factor must be depreciated. . . . While courts may remove the shackles of price control, as a practical matter, the licensees of a valuable patent may still be in economic bondage." Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws*, 51 Va. L. Rev. 273, 288 (1965).

and other "consumer acceptance" methods specifically pointed to the licensed product—in short, his commitment to that product—be inhibited from endeavoring to find substitutes. Certain lawful methods of computing royalties may have the same effect. See *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950).

A distinguished economist has contended that: "[I]n capitalist reality as distinguished from its textbook picture, it is not . . . [price] competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest-scale unit of control for instance)—competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. . . ." Schumpeter, *Capitalism, Socialism and Democracy* (3d ed. 1950), p. 84.[48] It may well be that with all comers comfortably licensed to produce the patented product at a royalty, although without a price restriction, the incentive for innovation would be stifled. For it is not from the established producer that innovation and change is apt to come: "It cannot be only chance that the Western Union interests underestimated the telephone, that the Telephone Company was slow to appreciate the possibilities of radio, that it remained for newcomers to bring out the inexpensive table model radio receiver . . . and that one small concern made the first F.M. transmitters while a local network was the first commercial enterprise to install them." Kottke, *Electrical Technology and the Public Interest* (1944), p. 127. "The British and American

[48] Thus, "in some fields the invention disclosed by the average patent is obsolete long before the seventeen-year expiration date." Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws*, 51 Va. L. Rev. 273, 286 (1965).

chemical firms took no part in the crucial discoveries connected with penicillin, and it was difficult enough to persuade them to take part at the pilot plant stage even when the chemo-therapeutic virtues of penicillin had been placed beyond doubt. . . . The Kroll system of producing ductile titanium was strangely neglected by the metallurgical and chemical corporations. When Baird called on the Marconi Company in 1925, he was told that they had no interest whatever in television." Jewkes, Sawers & Stillerman, *The Sources of Invention* (1958), pp. 189-90.

Thus, as the sources we have quoted suggest, a system which encourages the patentee to seek his reward through industry-wide licensing on a simple royalty basis may well have adverse consequences on the competition that under the present system comes from new products.—Once again, it is not an abstract point of legal doctrine which is before the Court here, but an issue of important economic consequences, and one to which the record before the Court is not in any way directed.

(4) *The second-source license and prevention of monopoly.—To what extent is the General Electric "second source" license with its price-restrictive technique used by the smaller concerns, and what would be the consequences in terms of the promotion of economic concentration if the technique were to be outlawed?*—Again, the record does not furnish a basis for an informed judgment except that it is obvious on the present record that Huck is a small business enterprise which has survived in an era of industrial concentration. It has, of course, been pointed out that "The right [of granting a second source license with a price-restrictive clause] is of special importance to small producers who might otherwise have to choose between being the sole manufacturer, in which case output would be small,

or licensing without price restrictions to titans able to undersell them." Note, *Price Fixing Through Patent Licensing*, 61 Harv. L. Rev. 1427, 1428 (1948). See Dominick, *Recent Developments in the Law of Price Restrictions in Patent License Agreements*, 11 Geo. Wash. L. Rev. 302, n. 4 (1943); Barnard & Zlinkoff, *Patents, Procedure and the Sherman Act*, 17 Geo. Wash. L. Rev. 1, 41 (1948).[49] Thus, in this context, it may well be that such licenses are "the only practicable means a smaller company has for breaking into or staying in business." *White Motor Co.* v. *United States, supra*, at 263; see also *id.*, at 269 (concurring opinion).

Indeed, the ability to increase output through a "second source" license with a price-restrictive clause may be an important factor leading smaller concerns into the field of research and development in the first place. Obviously, it is important to the national economy not to inhibit research and development work by those companies; but without the prospects of the rewards of profitable manufacture, these companies will not undertake research and development. In today's economy, where marketing techniques are so important, a small concern may well founder when it attempts to bring the product it has developed to market. It is in this stage that a "second source" price restrictive license would be most useful to a new company.

The inventor of the "Polaroid" camera—the basis of one of the most remarkable stories in recent commercial history

[49] Thus, the ability to grant a second source license on a price-restricted basis assures the small manufacturing patentee that he will not be squeezed out of the market. "It seems undeniable that the mere receipt of royalties, however satisfactory, can hardly ever be equivalent economically to the actual sale by the patentee of his own product, with all that such sale means in terms of good will, and continued successful operation of the patentee's manufacturing enterprise." Note, 2 Rutgers L. Rev. 254, 260-61 (1948).

of the entry and growth of a small firm in a market previously inhabited by giants—has written: "It is impossible for a new company involving a major advance in science or technology . . . to go through the extremely difficult periods of study; invention, development, engineering, and production . . . [and] to afford to advertise and to afford to distribute—without protection by patents." Land, *The Role of Patents in the Growth of New Companies*, 41 J. P. O. S. 502, 506 (1959). It is apparent that it is just to this sort of company that the ability to grant a second source license of the sort sanctioned in *General Electric*—possibly at a time when satisfaction of a budding public demand for its product would cause it to become established—would be most meaningful. "A new commodity may have to be put on the market on a minimum scale if it is to make an appropriate impact." Jewkes, Sawers & Stillerman, *The Sources of Invention* (1958), p. 206.

While the majority of patents are apparently owned by large corporations, it does not seem to be the case that the majority of really basic inventions are made by the research departments of large corporations. A recent study analyzes sixty-one of the most basic inventions of recent history, providing "a representative cross-section" of recent technical progress, and concludes that thirty-eight of them were the product of individual inventors or inventors associated with small companies, as was Mr. Louis Huck here. Jewkes, Sawers & Stillerman, *The Sources of Invention* (1958), pp. 75, 78-79; 263-410.[50] Certainly it would be in

[50] The thirty-eight inventions attributed to individual inventors or those associated with small companies: Air Conditioning; Automatic Transmissions; Bakelite; Ballpoint Pens; Catalytic Cracking; Cellophane; Cellophane Tape; Chromium Plating; Cinerama; Continuous Hot Strip Rolling of Steel; Cotton Picking Machines; Crease-Resisting Fabrics; Cyclotrons; DDT; Domestic Gas Re-

the interests of avoiding economic concentration—one of the basic purposes of the antitrust laws—to encourage production under these inventions by inventor-formed corporations and other small firms. Thus, any rule that would primarily affect the desirability of the patent rights of the inventor-formed corporation, or those of other smaller producers—as would the abolition of the *General Electric* rule—should require justification of a most positive sort. The present record certainly does not provide that justification.

(5) *The economic consequences of substituting assignment for "second source" licensing.—To what extent would sale or assignment of patents—again put forward by the Government as a desirable alternative to "second source" licensing with a price-restrictive feature—tend to suppress competition?*—Such sales or assignments may result in

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frigeration; Electric Precipitation of pollutants from industrial fumes; Electron Microscopes; Gyro-Compasses; Hardening of Liquid Fats; Helicopters; Insulin; Jet Engines; "Kodachrome"; Magnetic Voice Recording; Neoprene; Penicillin; "Polaroid" Land Camera; Power Steering; Quick Freezing; Radio; Safety Razors; Self-winding Wrist Watch; Streptomycin; "Sulzer" Looming; Synthetic Light Polarization; Titanium (development of use in pure form); Xerography; and Zippers. Jewkes, Sawers & Stillerman, *supra*, at 82, 87. For two other inventions, individual inventors contributed very basic ideas but extensive and early development was carried on by large companies: Silicones and Synthetic Detergents. *Id.*, at 368-69; 380. Besides these, only the following were created, according to the authors' account, in the laboratories of large firms: Acrylic Fibres; Diesel-Electric Railway Locomotives; Duco Lacquers; Fluorescent Lighting; Freon Refrigeration; Krilium; Long-Playing Records; Methyl Methacrylate Polymers ("Plexiglas"); Modern Artificial Lighting; Nylon; Polyethylene; Television; "Terylene" Polyester Fiber; Tetraethyl Lead; and Transistors. *Id.*, at 85-87.

The hearings of the U. S. Temporary National Economic Committee contain statements by eminent scientists corroborating this phenomenon of individual and small-firm invention as to the really basic, important inventions. Hearings, Part III, pp. 871-72 (Vannevar Bush); pp. 971-76 (Frank B. Jewett); p. 988 (Philo T. Farnsworth) (1939).

the patentee leaving the manufacturing field altogether. It may well be that the patent is likely to go to a company already in the field, with the result being to make that company dominant if it is not so already. Companies which already possess large numbers of patents are the likeliest customers for patents sold by others.[51] In these situations, there is always the danger that for one reason or another the assignee of the patent may not engage in production under it, thereby depriving the public of the benefits of the invention and the assignor—unless his assignment was for a lump-sum consideration—of the rewards of his royalty. See Wood & Johnson, *Patents and the Antitrust Laws*, 1950 U. Ill. L. Forum 544, 571-72.

It is, accordingly, rather odd for the Government to support the overruling of the *General Electric* rule, without proof that there will not be a substantially increased tendency on the part of patentees to sell their patents or to license them to large corporations and abandon manufacture themselves.[52] In the past, the assignment of patents

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[51] See the study, based on questionnaires, appearing in Note, *Patent Use Restrictions*, 75 Harv. L. Rev. 602, 619 (1962). As Study No. 26 of the Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, "The Patent System: Its Economic and Social Basis," 86th Cong., 2d Sess. (1960), p. 18, states: "Firms with established research, manufacturing and marketing facilities are likely to be favored in the acquisition of new inventions . . . . " See also the statistics on patent holdings of large corporations in Appendix I, Study No. 3 of Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee, 84th Cong., 2d Sess. (1956).

[52] To be sure, many small inventors cannot engage in the manufacture of their own invention for a variety of reasons. One common one is that the invention may be an improvement in a field of manufacture which is already dominated by large concerns and which it is impossible for the inventor to enter with his own company. Thus, the inventor of power steering, an individual, obtained his basic patents in 1931-33. He licensed General Motors but no real use was made of the invention until after the basic patents expired.

by individual inventors and small patent-owning companies to dominant firms has repeatedly led to situations in which antitrust suits have finally been brought by the Government. See *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956) (Cellophane); *United States* v. *Eastman Kodak Co.*, CCH 1954 Trade Cas. para. 67,920 (W. D. N. Y. 1954) ("Kodachrome" color film); Jewkes, Sawers & Stillerman, *supra*, pp. 272-74 (sale of Cellophane patent rights by inventor to duPont); *Id.*, at 321-23 (acquisition of Kodachrome invention by Eastman Kodak Company). Yet the Government has explicitly claimed the sale of patents to be preferable to their licensing on a *General Electric* "second source" basis. (J. S., p. 14)

While experience of this nature suggests that a rule which encourages the sale, rather than the practice of patent rights, as the overruling of *General Electric* admittedly would do, would be ill-advised, the present record does not afford an exhaustive answer to the question. However, it is not uninstructive to speculate on the situation which might have ensued had Huck sold its patent to one of the major steel companies desiring to engage in vertical expansion—say to Republic Steel Corporation which was interested in making lockbolts and asked for a license. (R. 104-05) Under those circumstances, the presence of Huck and Townsend in the production of lockbolts would surely have ended.

Jewkes, Sawers & Stillerman, *supra*, p. 344. Of course, a variety of other reasons, such as personal desire to avoid the business complexities of production or lack of business ability, may result in the transfer of patents to large corporations. But particularly since there are such factors pointing toward economic concentration, the abandonment of any rule which makes it easier for the small patent-owning firm to survive, as does the *General Electric* rule, should not be undertaken without a thorough factual justification.

(6) *Inefficiencies in a patentee's sole production.—To what extent would exclusive self-production by a patentee —again, one of the alternatives suggested as desirable by the Government—foster inefficiency?*[53]—Authorities have suggested that the *General Electric* rule finds a justification in the "more perfect allocation of resources [which] results as the inefficient producer is encouraged to allow efficient firms to commercialize the patent rather than to prefer self-production, even at less than optimum volume, to licensing without restrictions." Note, *Patent Price Restrictions and the Antitrust Laws: A Balance Upset,* 67 Yale L. J. 700, 712 (1958). The public may well be benefited by the making of improvements in the patented product by the second source;[54] if, as the Government contends, restriction of production under the patent to the patentee is the alternative, only one firm will be engaged in devising manufacturing techniques and improvements under the patent. The benefits to the public from a second source in this area will not be realized.—Again, the record affords no basis on which to put this factor into proper perspective.

(7) *Balanced interproduct competition and second source licensing.—To what extent is balanced competition between patented products fostered by the General Electric rule?* —An obviously important form of competition is competition between alternative patented products. The *General Electric* rule allows a small manufacturer who owns a patent to compete more effectively with a large manufacturer producing under a competing method, who may have

[53] "If the patentee is really afraid of competition he will refuse to license without protection and the patent monopoly will protect his inefficiency." Gibbons, *supra,* 51 Va. L. Rev., at 287.

[54] "Thus, there can be provided an assurance of . . . product improvement and development." Kareken, *supra,* 8 Patent, Trademark and Copyright J., at 109.

no need to license. The smaller concern may not be able to produce the desired volume of its own patented product. It appears clear that in these circumstances a second-source license of the *General Electric* type would help redress the competitive balance.—The present record provides no basis for evaluating this factor in terms of the competition between the patented lockbolts and other means of fastening or otherwise, in view of the Government's disclaimer below of any attempt to overrule the *General Electric* rule. But obviously it is an important competitive consideration.

B. The Arguments Made in Favor of Overruling *General Electric* Are Void of Factual Support on the Present Record.

The Government begins its argument that *General Electric* should be overruled with a short abstract and theoretical argument purportedly derived from the nature of the patent monopoly[55] and of the antitrust laws. (Gov't Br., pp. 19-23) We may pass this essentially theological discussion at once inasmuch as we assume that before announcing any *per se* rule putting an end to "second source" price-restrictive patent licenses, this Court will want, as it wanted in *White Motor Co.* v. *United States, supra,* to be advised as to the "economic and business stuff" from which these arrangements emerge and against the backdrop of which they must be examined.

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[55] Even this theoretical discussion is frequently misconceived. For example, the Government essays an allegedly consequential distinction between "the patented invention or discovery, *i.e.*, the novel idea or concept" and its physical embodiment. (Gov't Br., p. 22) But the nature of the patent grant is such as to entitle the patentee to prevent the "manufacture, use or sale" of those physical embodiments, whether or not made through an actual copying of his idea or concept. The question whether the patentee has a "property right" in the items is irrelevant.

The Government then embarks on an attempt to analyze supposed economic reasons against the *General Electric* rule. (Gov't Br., pp. 23-37) As is required by the nature of the record in the case, the affirmative arguments consist of naked assertions unembarrassed by any references to record material[56]—or, for that matter, to extra-record economic material. The technique is to advance conjecture and speculation against the practice sanctioned by the *General Electric* case, while dismissing the economic arguments in favor of it as "conjectural and speculative." (See, *e.g.*, Gov't Br., pp. 27-28; 33.)

We may make a short catalogue of the principal speculative assertions which the Government makes in contending that the *General Electric* rule is unsound.

1. *Assertion*: That the patentee may, by remaining a sole manufacturer, and without licensing, reap the rewards which the patent system intends for him to have in the form of monopoly profits on his own sales. (Gov't Br., p. 24) —Not only is this not supported by the present record, but it seems to be positively contradicted by it. For, while this assertion may have some validity as to the large corporation holding patents, it seems hardly the case as to the smaller producer who cannot satisfy the demand for the patented products. The record indicates that was the case as to Huck. Such a producer may not, without a price-restrictive second source license, reap the reward of manufacturing profits which the patent system intends and which it bestows upon the larger manufacturer who owns patents. —The "model" of the Government's economic sketch here appears to be solely the large producer.

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[56] Despite the Government's participation in a lengthy criminal trial which provides the evidentiary record for the present case on appeal, the entire argument section of its brief in this Court contains only three references to the transcript of that trial.

2. *Assertion*: That in the case of a patent which is licensed at a fixed royalty (the Government's indicated alternative to the price-restrictive licensing permitted by *General Electric*) the strength of the invention is the determinative factor as to whether the patentee may, by charging a sufficiently high royalty, remain a viable competitor with his licensee. (Gov't Br., p. 25)—This is nothing but the wildest of abstract speculation. For one thing, it assumes that all competitors are of equal economic strength, which is a common assumption among economic theoreticians but which is hardly a useful means for judging the consequences of a legal rule in the real world.

3. *Assertion*: That the reason for imposing a price restriction on the licensee, or a high royalty rate upon him, must be the patentee's "inefficiency". (Gov't Br., p. 25)—Again, there is no basis for this speculation. One obvious reason why a price restriction or high royalty has to be imposed is the fact that, by definition, the patentee has a capital investment in either the research that went into the invention embraced in the patent, or in acquiring the patent from the original patentee; and that the licensee has no such investment, and, accordingly, can undersell the patentee unless the patentee has quite a "deep pocket."

4. *Assertion*: That price-restrictive clauses will more readily be assented to by a licensee if the patent is unimportant than if it is important. (Gov't Br., p. 26)—There is absolutely no evidence of record or extra-record material to which the Government can point in support of this assertion. Since the patent must be broad enough to cover the end item sold in order to validate the price restriction (see pp. 71-72, *infra*), it seems clear that the exact opposite of what the Government asserts is true.

5. *Assertion*: That factors other than the rewards of the patent system are "compelling" factors inducing expenditures in research and development. (Gov't Br., p. 28) —While it would be foolish to deny that factors other than the patent reward contribute to investment in research and development, it is, as the Government even seems to admit, impossible to say that they are the dominant factors. The existence, since 1790, of patent legislation reflects the long-continued judgment of Congress that the patent reward does have a material effect on the stimulation of invention.

6. *Assertion*: That there is no net gain for competition from the fact that—as the Government appears to concede —the *General Electric* rule induces some patentees to grant licenses who would otherwise not do so. (Gov't Br., p. 29) —The Government dismisses any argument to the contrary as speculation.—But there is nothing speculative about the patentee's statutory power to exclude others from the practice of the invention. Certainly to the extent that any patentee chooses to grant a price-restrictive second source license, rather than to be the sole manufacturer, there is some net gain for competition, as we have developed above. (Pp. 41-45)

7. *Assertion*: That patentees who grant price-restrictive licenses would not grant licenses if they believed that the licensees would be likely to divert any substantial amount of existing or potential business. (Gov't Br., p. 33)[57]—

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[57] The Government's argument on this point is so typical of the speculative and conjectural nature of its brief that we cannot forbear quoting it *in toto* with all the "weasel words" suitably italicized:

> "In appraising the competitive significance of a second source of supply with price restraints, it must be borne in mind that *we are assuming* the case of a patentee who would

Again, this is a completely abstract speculation, which has —like so much of the Government's theoretical presentation —a semblance of factual foundation only in the case of the large manufacturer. For a small manufacturer, like Huck, to admit a second source is to make a decision that will cost it potential business. Huck here recognized that: "The licensee's first customers would probably be our customers." (R. 504) Against this diversion of potential business there lies, for the small manufacturer, the consideration of development of the market through the participation of a second manufacturer, the rewards of the patent royalty, and the protection of the patentee's own investment in research and product development by the price-restriction provision.

8. *Assertion*: That acceptance of a price-restrictive license prevents competitors from challenging the validity of a patent, from seeking to narrow its scope, or from "inventing around it," that is, developing inventions of their own which take a different route, or which involve the development of nonpatented, noninfringing substitutes. (Gov't Br., pp. 33-35)

The difficulty here is that the adverse consequences of price-restrictive licensing suggested by this argument are primarily inherent in the situation of a patentee who has licensed a number of concerns with a price-restriction

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deny all licenses rather than permit price competition. But such a patentee *presumably* would be equally *unlikely* to grant licenses that have price-fixing provisions if he believed that the licensees would be *likely* to divert *any substantial amount* of existing or potential business. Similarly, *it is doubtful* that a patentee would be *likely* to grant a license which would establish a competitor for the period after the patent had expired, if he thought this would create real competition. *In the rare cases* where a patent actually could provide complete domination of a market for 17 years, *it is doubtful* that the price-fixing option would induce the patentee to license." (Gov't Br., p. 33)

clause. Such an arrangement obviously may involve the consequences which the Government denounces.[58] It can involve concerted activity among several persons—the multiple licensees—who are not the beneficiaries of the patent monopoly. It can be the vehicle for the regimentation of an entire industry in a system of price control, with the patent simply used as a "cover" for these purposes.

But the situation is not the same in the case of a single "second-source" license with a price restriction. Here numerous other concerns made application to Huck for licenses and were refused. These firms—or others in the fastener manufacturing field or otherwise—could have contested the validity of the patent or its scope, devised non-patented substitutes, or sought their own patented processes. Moreover, there is evidence in the record—which was never fully developed in the light of the Government's disclaimer of any attempt to seek an overruling of *General Electric*—that there were on the market adequate substitutes for the patented lockbolts (R. 366), and that they offered price competition to lockbolts. (R. 365-66) If this case had been properly framed as a case to test *General Electric*, evidence as to these substitutes and the price and other considerations affecting their use could have been de-

[58] There is disagreement as to whether multiple licensing with a price restriction is a *per se* violation. See Note, *supra*, 67 Yale L. J., at 703-05. The potentialities of a multiple licensing system for abuse are more pronounced, leading to their condemnation in the *Line Material*, *Gypsum*, and *New Wrinkle* cases. However, the single "second source" license involved here has entirely different consequences in terms of competition from the typical form of industry-wide multiple licensing scheme found in the cases. It is the industry-wide multiple licensing system as to which it can be said: "The major objection to license price fixing is that the practice can be used as a screen to shield a mutually advantageous, voluntary renunciation of price competition by the parties." Gibbons, *Price Fixing in Patent Licenses and the Antitrust Laws*, 51 Va. L. Rev. 273, 280 (1965).

veloped, in terms of the effect on competition of the "second source" license involved here.

For the fact of the matter is—and certainly the present record offers no basis for a conclusion to the contrary—that the single "second source" patent license involved here would not stifle competition—as might a system of industry-wide price-restrictive licensing, which has been condemned. The rest of the industry was here left unlicensed and had every incentive to compete with substitute products. As was once cogently observed: "The patent system encourages invention, not only in that it rewards the inventor with a patent, but it spurs the competitors to put forth their best effort to produce a product as good, yet different from the patentee's." *James P. Marsh Corp.* v. *United States Gauge Co.*, 129 F. 2d 161, 164 (7th Cir. 1942). And it has been well said that the "courts have recognized [that] new processes and patents are perhaps the most desirable form of competition." *United States* v. *E. I. duPont de Nemours & Co.*, 118 F. Supp. 41, 214 (D. Del. 1953), *aff'd*, 351 U. S. 377 (1956).[59] Unlike the case in a scheme of industry-wide licensing—with or without price restriction—the firms which were refused licenses, and the rest of the fastener industry, had every incentive to compete here with Huck and Townsend by developing their own noninfringing substitutes or, for that matter, by challenging the patents in question.

Moreover, this was definitely not a case in which the patentee and the existing licensee actively sought to foist the license, with its price-restrictive clause, upon other firms in

[59] While the Government declined to put in proof of substitutes and competing products and objected to proof as to them, before the objection was made proof was received that at least one airframe manufacturer never used lockbolts at all. (R. 366)

order to serve as a cover for the cartelization of the entire industry. See *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371, 374 (1952); *United States* v. *United States Gypsum Co.*, 340 U. S., at 83; Furth, *Price-Restrictive Patent Licenses Under the Sherman Act*, 71 Harv. L. Rev. 815, 838-39 (1958). —Here the operative restraints were those of the lawful effect of the patent grant, not those of the industry's desire to sell at fixed prices. Not only did Huck steadfastly refuse to grant licenses to others than Townsend, but it licensed Townsend only after there had been a lawsuit between them which had established the validity of the Huck patent. (GX 25, R. 501)

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In sum, the Government is asking this Court—on the basis of a record which was not framed to present the question—to establish a flat rule that price restrictions in patent licenses, irrespective of the circumstances, are always to constitute *per se* violations of the Sherman Act.—This is to be the case, under the Government's contention, whether we are dealing with a single small inventor with a few patents or with a corporate giant whose research department controls thousands of patents; whether a package licensing or an individual licensing policy is involved; whether an industry-wide licensing system or a simple "second source" license is employed; whether, in short, such a price restriction is a tool to eliminate competition between giant industrial units and multiple, large licensees or a refuge for a small manufacturing inventor, with limited resources, desiring to create a broader manufacturing base for his product.

Two distinguished commentators, who oppose the *General Electric* rule, have written as to the justification for antitrust *per se* rules:

"The substantive justification of a per se rule must rest on the fact or assumption that the gains from forbidding the specified conduct far outweigh the losses. The magnitude of this difference, plus the administrative gains, must be enough to justify the element of arbitrariness which is always involved. This requires, first, that the harmful effects of the practice be significant; and second, either that they depend to a great enough extent on the outlawed practice so that they cannot be easily achieved in other ways, or that such ways can be anticipated and also be forestalled by per se rules. If these conditions are met, then one of three further conditions must be met. . . ." (Kaysen & Turner, *Antitrust Policy* (1959), p. 143)

Discussing these "further conditions," these commentators do not place the practice of a price restriction in patent licenses in the category of one which can be said to be "always harmful, whatever the circumstances of its use" (Condition 1), or one which is "sometimes harmful and sometimes neutral, but never contributes positively to the working of the market." (Condition 2) Rather, they clearly indicate (*id.*, at 172-73) that the practice of price restrictions in patent licenses is one which, if it is to be found a *per se* violation, must be included in the category of practices which are sometimes beneficial:

"The practice is sometimes harmful, sometimes neutral, and sometimes beneficial, but the aggregate of harm in situations in which it is harmful far outweighs the aggregate of benefit in situations in which it makes a beneficial contribution to the working of the market. Or alternatively, there are both harmful and beneficial aspects of the practice in a particular situation and these vary from situation to situation; but in the aggre-

> gate of all situations, harm far outweighs benefit. The difference between aggregate harm and aggregate benefit must be so great that the cost of distinguishing harmful and beneficial situations by an examination of the relevant circumstances is not worth incurring." (*Id.*, at 143)

In the first place, it should be observed that the decisions of this Court have never sanctioned imposing a *per se* rule under these circumstances, presumably because of the problems in making the calculus suggested by these authors. *Per se* rules have been reserved for practices which are characterized by a "lack of any redeeming virtue." *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958).[60] But, in any event, it is manifest that the present record does not afford this Court any basis on which to make any such judgment as to the comparative benefits and burdens to competition of the narrow practice, involving a single "second source" license with a price restriction, involved here.[61] As we have demonstrated, the record here was made on a

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[60] "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore, illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.*, at 5. *Cf. White Motor Co.* v. *United States*, 372 U. S. 253, 265 (1963) (concurring opinion): those practices which in "every form" are "utterly without justification." Messrs. Kaysen and Turner admit that the practice of price restrictions in a patent license is not in this category.

[61] Of course, we do not agree with the assessment of the practice sanctioned by *General Electric* which the commentators proceed to make after setting forth this set of prerequisites for a *per se* rule. Their discussion appears to consist of speculation as abstract as that which constitutes the Government's argument here; after which they simply assert that "we would be inclined to cut the knot by overruling *General Electric*." (*Id.*, at 173) But the method to be employed is—legislation! (*Id.*, at 271) See pp. 66-67, *infra*.

basis completely foreign to such an inquiry—on issues framed by the Government's sole contention below that the conduct here had been outside of the *General Electric* rule.

It is worth observing that the single "second source" license involved here is not only at the core of what is permitted by the *General Electric* doctrine, but also appears to have the most positive benefits to the preservation of competition of any form of price-restrictive license. Indeed, a commentator opposed to the *General Electric* rule has admitted that: "If all price-restrictive licensing is not to be deemed illegal, the exception for the single-license situation presents the least danger to antitrust policy and thus possesses the best claim for recognition." Gibbons, *supra,* 51 Va. L. Rev., at 300-01. *Cf.* Diggins, *The Patent-Antitrust Problem,* 53 Mich. L. Rev. 1093, 1106 (1955).

Thus—and the present law appears to have come to this posture—it would appear an effective accommodation of the policies of the antitrust laws and of the patent laws to hold that whatever may be the case as to an industry-wide licensing system, a single "second source" license is not *per se* unlawful, but would only become unlawful upon proof of a specific anticompetitive abuse. Accordingly, the grant of a single "second source" price restrictive license would be reserved to the patentee, as one of the benefits of the statutory patent reward, as a closely circumscribed privilege. *Cf. United States* v. *Colgate & Co.,* 250 U. S. 300 (1919); *United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960).

The absence of any form of record proof directed to the issue makes this case an inappropriate one to answer the question whether the Court should go to the extreme of outlawing even the single "second source" price restrictive license. On this basis, the Government should be held

to its repeated waiver in the court below of any challenge to the *General Electric* rule.

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Indeed, it is a very real question whether the *General Electric* case is at this juncture a proper subject for judicial reconsideration at all. *Cf.* Furth, *supra,* 71 Harv. L. Rev., at 815. The decision is thirty-nine years old and it has been seventeen years since the United States challenged its validity in this Court.

The present balance between the antitrust laws and the patent laws represented by the *General Electric* rule, properly construed, is one which appears to have been reached in the cases decided by this Court in the late 1940's which put *General Electric* in its proper perspective. Since then, the area has been the subject of very little litigation, tending to suggest that a realistic balance has been struck. Continuation of the *General Electric* rule has been supported by the Attorney General's National Committee to Study the Antitrust Laws. (See its Report (1955), pp. 223, 235.) Congress from an early date was presented with legislation to repeal the *General Electric* rule, and declined to do so; and the subject does not even seem to be one any longer being pursued in Congress.[62]

In the light of the passage of time and the obvious complexity of the issue, together with the demonstrated astuteness of the courts in striking down schemes that go beyond the narrow patentee practice permitted by *General Electric,*

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[62] Legislation to overrule the *General Electric* rule was introduced through the 1940's without success. See S. 270, S. 2491, S. 2730 and H. R. 7713, 77th Cong., 2d Sess. (1942); H. R. 109, H. R. 1371, and H. R. 3874, 78th Cong., 1st Sess. (1943); H. R. 97 and H. R. 3462, 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947). See Note, *supra,* 2 Rutgers L. Rev., at 264.

it might well be most advisable to leave the question of the continued validity of that doctrine to Congress. "[T]he relevant considerations are so complex and so indeterminate . . . that legislation is the only eventual answer. . . . Is it better to permit a price-fixing clause in a patent-licensing agreement in order to encourage the licensing of other producers and ensure that effective competition will reign once the patent runs out? . . . These questions would be better handled, whether the answers depend on facts or, as seems likely, on a large measure of hunch,[63] by Congress as a part of a thoroughgoing reconsideration of patent policy in the light of antitrust considerations." Turner, *Antitrust Policy and the Cellophane Case,* 70 Harv. L. Rev. 281, 317 (1956). See also Note, *Antitrust Problems in Patent Pooling and Multiple Licensee Agreements,* 20 U. Pitt. L. Rev. 54, 61 (1958); Note, 96 U. Pa. L. Rev. 126, 128 (1947).

Interestingly enough, the Government itself indicates that many of the factors involved in the question whether the *General Electric* rule is a proper accommodation of the patent laws and the antitrust laws are matters properly for legislative rather than judicial cognizance. (Gov't Br., p. 28)—However, this leads the Government not to argue that the case should not be overruled, but to argue that it should be overruled and that the problems that would be created by such a judicial course of action be then taken in hand and dealt with by Congress. (*Ibid.*) Even as part of an argument as academic as the Government's, this suggestion seems extreme.

In any event, even assuming that judicial reconsideration of *General Electric* at this point is appropriate, any con-

[63] Of course, we do not endorse the suggestion of the author that antitrust-patent problems need or should be solved on the basis of "hunch."

sideration of overruling the case should be undertaken on a proper record, framed for that purpose, showing the economic structure of an industry, the position of the patent or patents in question in it, defining the relevant market and the competing nonpatented substitute products, and offering some basis to the Court for an informed judgment as to the practical factors involved in overruling the *General Electric* rule. The present record obviously does none of these things.

III. THE PRAGMATIC REASONS ADVANCED BY THE GOVERNMENT FOR OVERRULING *GENERAL ELECTRIC* ARE WITHOUT SUBSTANCE

The Government advances a number of pragmatic reasons, purportedly based on considerations of judicial administration, to justify the departure from thirty-nine years of precedent which overruling of the *General Electric* case would involve. (Gov't Br., pp. 38-45) The reasons given are specious, and in fact the Government's efforts only demonstrate the current lack of any practical reason for overruling *General Electric*.

1. The first reason is, as the mixed metaphor quoted by the Government has it, that the *General Electric* decision has been "whittled away by subsequent decisions to a mere shadow of its former self." [64] (Gov't Br., p. 39) But, as our

[64] The quotation is from Williams, *Conflicting Landmark Decisions on Restrictive Patent Licenses*, 10 Antitrust Bull. 295, 305 (1965). Mr. Williams is a former Government lawyer who tried the *Line Material* case; in his article he admits (quite unnecessarily because of its obvious character) to his "bias" on the question whether *General Electric* should be overruled. *Id.*, at 295. However, even Mr. Williams is unable to look on the question whether *General Electric* should be overruled as a live one in present day antitrust enforcement. As he observes with obvious nostalgia: "Patents and antitrust law was a popular subject on Bar Association programs during the late 1940's but merger pushed it into the background during the '50's." *Id.*, at 295.

review of the strict enforcement of the limitations on *General Electric* demonstrates, all that has happened is that the courts have been quick to strike down departures from the narrow privilege afforded by the case. To be sure, *General Electric* is of "no practical use" (Gov't Br., p. 39) to the patentee who wishes to organize an industry-wide price-fixing scheme, to participate in a patent pool, to engage in cross-licensing with other patentees, to engage in resale price maintenance, or to impose price restrictions beyond the scope of his patent. In short, the doctrine may be of little practical use to the large producer who has no commercial need to see a "second source" established. Perhaps this is what caused the General Electric Company's own counsel to state that the net effect of the decisions putting the *General Electric* case in proper perspective was "to limit the commercial utility of price restrictions." Wood & Johnson, *Patents and the Antitrust Laws,* 1950 Univ. of Ill. L. Forum 544, 564; Gov't Br., p. 40. See *United States* v. *General Electric Co.,* 82 F. Supp. 753, 905-06 (D. N. J. 1949).

But while attempts to apply the *General Electric* doctrine beyond the facts presented by that case are no longer countenanced and hence the doctrine may be of limited utility to the plans of giant corporations, it is of obvious importance, within its limited scope, to the small inventor and the small business concern.[65] If the record in this case—

[65] There have been a number of cases subsequent to *Line Material* in the lower courts upholding, in private litigation, patent license agreements with price-restrictive features. See, *e.g., Prestole Corp.* v. *Tinnerman Products, Inc.,* 271 F. 2d 146, 156-57 (6th Cir. 1959); *Glen Raven Knitting Mills, Inc.* v. *Sanson Hosiery Mills, Inc.,* 189 F. 2d 845, 853-54 (4th Cir. 1951); *Ronson Patents Corp.* v. *Sparklets Devices, Inc.,* 112 F. Supp. 676, 685-86 (E. D. Mo. 1953). The existence of cases like the foregoing—each of which involves a single price-restrictive license by an apparently small concern—indicates

which was not framed with a view toward the reexamination of *General Electric*—teaches anything, it teaches that. For here the record is plain that the *General Electric* doctrine permitted a small business concern, a family business founded by an inventor, Louis Huck, to provide the "second source" which its customers were demanding, without sacrificing the benefits of or abandoning the fruits of manufacture under two strong basic patents.

2. The Government also suggests that there is continuing uncertainty as to the proper application of the *General Electric* doctrine. To alleviate this condition, the Government suggests radical surgery; the overruling of the doctrine. It might be advisable to see whether the patient is actually ill before proceeding with the operation.

In point of fact, *General Electric's* scope is by now quite well settled. Even the Government brief's citation practice, which omits reference to the dates of the allegedly controversial cases which it cites, cannot mask that.

a. The Government cites the question as to whether after the *Line Material* and *Gypsum* cases, a multiple licensing scheme with a price-restrictive clause is a *per se* violation of the Sherman Act, or subject only to the rule of reason. (Gov't Br., pp. 40-41) The only decision examining the point in the last ten years concluded that such a scheme was a *per se* violation. *Newburgh Moire Co.* v. *Superior Moire Co.*, 237 F. 2d 283 (3d Cir. 1956). In fact, no reported case since the *Line Material* decision has sanc-

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that the *General Electric* doctrine is still the subject of practical reliance by businessmen, and that price-restrictive licenses are, as the District Court observed in *Prestole*, "not uncommon." 271 F. 2d, at 157.

tioned such an arrangement.[66] This issue is the only shadow of controversy left in the *General Electric* area, and, in view of the infrequency of litigation and the apparent reluctance of the courts to uphold any specific challenged price-restrictive multiple licensing scheme, it appears to be primarily of academic interest.

b. The only other allegedly controversial areas of application of *General Electric* which the Government has been able to unearth are two issues as to what the relationship between the patent and the article sold must be in order to justify a price restriction by the patentee. (Gov't Br., pp. 41-42)

The first "controversial" issue is whether a licensor of a process patent may control the price of the unpatented end item produced under the process by the licensee. Here a conflict of circuits is claimed to exist. (Gov't Br., pp. 41-42)—What is meant by this is that a panel of the Second Circuit, consisting of Judges Chase, Manton and A. N. Hand, in 1936 held that a price restriction was permissible under these circumstances. *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (2d Cir. 1936). The other half of this supposedly live conflict of circuits consists of the fact that the Courts of Appeals that have passed on the question after the antitrust climate changed in the late 1930's have rejected the *Straight Side* case and held the practice to be beyond the rule of the *General Electric* case and violative of the Sherman Act. See *Barber-Colman Co.* v. *National Tool Co.*, 136 F. 2d 339 (6th Cir. 1943); *Cummer-Graham Co.* v.

[66] The only contrary authority in the lower courts cited by the Government is a dictum in a Fourth Circuit case decided in 1950 relating to certain practices which antedated *Line Material*. See *Westinghouse Electric Co.* v. *Bulldog Electric Products Co.*, 179 F. 2d 139, 143 (4th Cir. 1950). See n. 58 p. 60, *supra*.

Straight Side Basket Corp., 142 F. 2d 646 (5th Cir. 1944). In the latter case, this Court denied certiorari despite the alleged conflict, although the Government's brief does not seem to include the citation. 323 U. S. 726 (1944). In fact, despite the 1936 Second Circuit decision, it was said by Judge Learned Hand, after the Fifth and Sixth Circuit decisions, that the question was "in flux" in his Circuit. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 438 (2d Cir. 1945).

Thus, there is no real controversy and the law has been definitely settled in favor of a strict interpretation of the privilege granted by the *General Electric* case.

The second issue involves the question whether a patent on a device justifies a price restriction on the sale of the end-item in which the device is a component. Here, the Government has been able to find a 1940 District Court case holding that it does. *General Electric Co.* v. *Willey's Carbide Tool Co.*, 33 F. Supp. 969 (E. D. Mich. 1940). All the later cases take the contrary view. *United States* v. *General Electric Co.*, 80 F. Supp. 989, 1004-05 (S. D. N. Y. 1948); *United States* v. *General Electric Co.*, 82 F. Supp. 753, 813 (D. N. J. 1949). Apparently no patentee has risked litigating the issue since 1949 and here, once again, the law can be regarded as definitely settled in favor of the more restrictive view of the privilege.

3. As a last effort, in order to put a patch over the undeniable fact that, despite the Expediting Act providing for direct appeals to this Court, and despite the allegedly pernicious effect of the *General Electric* doctrine, no case involving any substantial question of law relating to it has come before the Court in the last fifteen years, the Government has rummaged among the cases in the "blue book" of unadjudicated antitrust complaints and consent

decrees to try to find some indication that the *General Electric* rule is causing prejudice to the public by requiring the Government to bring a multiplicity of suits to curb abuses of it. (Gov't Br., pp. 42-45) This effort reveals that, apart from this case, a grand total of three actions have been filed by the Government in the last ten years involving alleged abuses of the *General Electric* rule.[67] On this

[67] See the list in Gov't Br., pp. 44-45 n. 25. The only actions listed which were commenced in 1955 or later were *United States* v. *Robertshaw-Fulton Controls Co.* (Civ. 14745, W. D. Pa. 1956); *United States* v. *Driver-Harris Co.* (Civ. 942-56, D. N. J. 1956); and *United States* v. *Minnesota Mining & Mfg. Co.* (Crim. 61-73-D, E. D. Ill. 1961). In all three cases the price-restrictive licensing charged was either only a minor element of an extensive conspiracy or monopolization or was a part of conduct clearly unlawful under the decisions putting *General Electric* in perspective. In *Robertshaw-Fulton*, the basic offense charged was a patent pool between two patent-owning defendants controlling between them 96 per cent of the market, together with agreements among the separate patentees restricting the licensing of individual patents. Other violations of the Act, including acquisition of competitors and patent cross-licensing, were charged. In *Driver-Harris*, an industry-wide multiple licensing scheme was apparently involved, including the setting of production and sales quotas among the conspirators. The *Minnesota Mining* indictment charged the forcing of price-restrictive multiple licenses on the rest of the industry through a coercive scheme.

The relevant footnote in the Government's brief identifies a total of five cases filed earlier, that is, between the decision in *Line Material* in 1948, and 1955. All of these earlier cases again involved conspiratorial or monopolistic behavior in which price-restrictive licensing was only a minor element. Of these, *United States* v. *Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), *aff'd*, 355 U. S. 5 (1957) (filed 1950) was the only litigated case and is discussed in note 70, *infra*. *United States* v. *Austenal Laboratories, Inc.* (Civ. 50-496, S. D. N. Y. 1949), was apparently a classic industry-wide multiple licensing scheme compounded by division of markets and tie-in sales by the patentee. *United States* v. *Scott & Williams, Inc.* (Civ. 54-358, S. D. N. Y. 1949), charged a conspiracy between the dominant hosiery machinery manufacturer in this country and its counterpart in Great Britain, under which the American defendant was charged to have acquired patents with an intent to monopolize, to have tied the licensing of its patents to the purchase of unpatented machinery, and to have resorted, in classic monopolist's fashion, to curbs on secondhand sales of its machinery and refusals to repair machinery where the users had added parts

basis, it is possible to infer a certain amount of overstatement in the Government's suggestion that the absence of a *per se* rule in this area is causing the public to pay "a heavy toll" until actions can be brought to curb specific abuses under the doctrine.

In fact, this dearth of litigation strongly suggests that the *General Electric* privilege is no longer abused to any extent by the dominant firms against whom antitrust proceedings justifiable in economic terms might be brought by the Government. This circumstance is strongly suggestive of the fact that the *General Electric* privilege is now availed of primarily in situations like the one in the case at bar: single, "second-source" licenses granted by small manufacturing patent owners who desire to establish a broader base of manufacture, without destroying the rewards which the patent gives them, and without abandoning manufacture themselves.

One final point, as to whether there is any pressing need for an overruling of a case which has stood for thirty-nine years as a source of a limited privilege to the small manufacturing inventor desiring to establish a second source,

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made by its competitors. *Cf. United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 325 (D. Mass. 1953), *aff'd*, 347 U. S. 521 (1954). *United States* v. *Michigan Tool Co.* (Crim. 33671 and Civ. 12605, E. D. Mich. 1953), primarily involved a variety of similar anticompetitive practices in the gear-cutting machinery industry, together with cross-licensing of patents. *United States* v. *Minnesota Mining & Mfg. Co.* (Civ. 8-119, D. Mass. 1949), primarily involved an export pool together with a patent pool involving patents owned by a number of separate patentees.

The conduct charged in these complaints and indictments was so aggravated, and the relevance of the patent license price-fixing to it so incidental, that it is hard to imagine that the defendants would have been in any material fashion inhibited by a *per se* rule on price restrictions in patent licenses. It is, of course, not irrelevant that all these cases which have been concluded, were carried to a successful conclusion by the Government.

is suggested by the record of this case. It is puzzling why, if what was badly needed in this area of the law was a complete extirpation of the *General Electric* doctrine, this need did not dawn upon the Department of Justice in the present case until the time came for filing its notice of appeal. The repeated affirmations by the Government that it was not seeking an overruling of the *General Electric* case—and its declaration that it was "good law" (R. 729)—do not appear entirely consistent with its current position that the doctrine is so productive of evil results as to warrant overruling a unanimous decision of this Court, rendered thirty-nine years ago, in a case where the record is not framed to present the issue and where every procedural consideration looks the other way.

All these factors unite to suggest that a wholly academic issue, unrelated to the needs of modern antitrust enforcement, is being foisted upon this Court in the present case.

IV. THE ARRANGEMENTS SHOWN OR SUGGESTED BY THE PRESENT RECORD ARE PERMITTED BY THE *GENERAL ELECTRIC* RULE

The only respect in which the Government contends in this Court that the conduct of appellees went beyond that permitted by the *General Electric* case lies in the allegedly exclusive feature of the license.[46]—As to this point again, we will argue the legal questions as if the alleged oral agreement testified to by Looker had been shown to be a fact, although neither of the District Judges accepted his testimony except for the purposes of passing on the ques-

[46] In the *General Electric* case, while the license to Westinghouse was the only license containing a price restriction, it appears that other licenses had been granted without a price restriction clause. 272 U. S., at 481.

tions of law.—While the written license agreement, of course, contains an exclusivity feature, that feature terminated in September, 1956, and the license has thereafter been nonexclusive. Although Huck refused licenses to others after 1956, the District Court found that Townsend had not participated in Huck's refusals. (Fdg. 22, R. 712-13)

1. In the first place, even assuming the truth of Looker's story, the Government's argument is based on a complete misconception of the record. The Government argues that the agreement of the parties went beyond the *General Electric* rule "since Townsend undertook to follow Huck's prices not in return for the right to use Huck's patents *(which it would continue to have whether or not it followed such prices)*, but to assure that Huck would not license anyone else." (Gov't Br., p. 50, emphasis supplied)

This factual recital by the Government would have been correct if Looker had testified that, subsequent to the execution of the written agreement, the parties had orally agreed to an extension of the two-year exclusiveness and price-restriction features in the patent license—which as a license ran for the full life of the patents. If that had been the time sequence, the Government could well have said that Townsend would have continued to have the right, under the license, to use Huck's patents whether or not it followed its prices; and from this it might be argued that the price restriction was not intrinsic to the patent license, though even then the legal consequences are far from clear.

But that was not the arrangement to which Looker testified. His testimony was that the parties entered into the oral agreement some time before the execution of the written license. Thus, at the time the alleged oral agreement was entered into, there was no license between the parties.

As Looker testified to them, the facts were that the parties agreed that while the written license would specify September 1956 as the termination date for these two features, the actual agreement was that they would continue until the patents expired in November 1967. This means that the alleged provision of the exclusive and price-restrictive features for the life of the patents was an integral part of the licensing agreement, similar in effect to the written two-year provision for those features. Certainly the Government would not argue that, under the written two-year provision in the license, Townsend could ignore the prices set by Huck and at the same time continue to enjoy the benefits of Huck's patents.

Thus the entire factual premise of the Government's argument simply does not exist on the record. Even if Looker's testimony is credited, all that is involved is an exclusive license with a price-restriction feature for the life of the patents in question.

2. The inclusion of the exclusivity feature in the price-restrictive patent license, once *General Electric* is assumed to be good law, clearly does not constitute a violation of the Sherman Act on this record. The right to exclude others from making, using, or selling the invention described in the claims of the patent is the precise nature of the patent grant. 35 U. S. C. §154. Exclusive licenses are old and common in the patent field[69] and, of course, neither this Court nor any other federal court has ever held that they violate the Sherman Act. The Government's suggestion that even without a price restriction an exclusive patent license is a *per se* violation of the Sherman

[69] See, *e.g.*, *Bauer* v. *O'Donnell*, 229 U. S. 1 (1913); *Bement* v. *National Harrow Co.*, 186 U. S. 70 (1902); *Hayward* v. *Andrews*, 106 U. S. 673 (1882); *Brownell* v. *Ketcham Wire & Mfg. Co.*, 211 F. 2d 121 (9th Cir. 1954); *Becton, Dickinson & Co.* v. *Ersel & Co.*, 86 F. 2d 267 (6th Cir. 1936).

Act appears the product of overexuberance.[70] See *Standard Oil Co.* v. *United States,* 283 U. S. 163, 179 (1931); *United States* v. *E. I. du Pont de Nemours & Co.,* 118 F. Supp. 41, 224 (D. Del. 1953), *aff'd,* 351 U. S. 377 (1956). *Cf. Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 456 (1940).

Moreover, assuming *General Electric* to be "good law," it is impossible to see how the inclusion of an exclusive feature in a single price-restrictive license amounts to a *per se* violation of the Sherman Act. None of the commentators who have argued against the *General Electric* rule have suggested that the rule has what they consider special adverse effects where an exclusive license is concerned. On the contrary, as we have developed, it is in

[70] Thus the Government contends that: "Any agreement whereby the patentee surrenders his freedom to license others is of doubtful validity even when price fixing is not involved," and ". . . competitors may not share the power to exclude which the patent laws give only to the owner of a patent." (Gov't Br., pp. 50-51). The only inference we can draw from this language is that exclusive patent licenses are supposed to be *per se* unlawful; under them, the patentee does surrender his freedom to license others, and, by granting or withholding a waiver, the licensee (typically a competitor) may come to share in the patentee's "power to exclude." However, not only have repeated decisions of the courts sanctioned these arrangements, but the cases cited by the Government do not, of course, even remotely support its assertion. Two of the cases involved were "cross-licensing" conspiracies, condemned as such, *United States* v. *Line Material Co.,* 333 U. S. 287 (1948); *United States* v. *Besser Mfg. Co.,* 96 F. Supp. 304 (E. D. Mich. 1951), *aff'd,* 343 U. S. 444 (1952); one involved a conspiracy among two patentees whereby one agreed to suppress the practice of his patent, *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.,* 166 Fed. 555 (D. Mass. 1909); one involved an exclusive license (which the licensor was in no position to grant), used as part of a bizarre conspiracy involving vertical price-fixing, the use of obviously invalid patents, fraudulent infringement suits, and sham settlements, *United States* v. *Krasnov,* 143 F. Supp. 184 (E. D. Pa. 1956), *aff'd,* 355 U. S. 5 (1957); and the remaining three cases do not involve patents at all. *United States* v. *Terminal Railroad Ass'n,* 224 U. S. 383 (1912); *Associated Press* v. *United States,* 326 U. S. 1 (1945); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959).

the situation where a multiple licensing scheme is in effect that a price restriction clause can take on unlawful aspects, not where a simple "second-source" license, exclusive or nonexclusive, is involved. Viewed that way, the exclusivity feature gives the price-restricted licensee an assurance that he will not become a party to an unlawful multiple licensing combination. Thus, there certainly appears to be no policy reason for treating an exclusive "second-source" license with a price restriction any differently from a single nonexclusive license of that nature.

The appellees here were each small producers—their combined annual sales of the product in question were only about $6 million—of a product for which there were adequate substitutes in the relevant product market. Accordingly, the record does not present the question whether an exclusive license with a price-restrictive clause might, under circumstances of the domination of the relevant product market by the patentee and the licensee, become a violation of the Sherman Act. *Cf. Associated Press* v. *United States,* 326 U. S. 1, 13, 17-18 (1945). As noted, the Government introduced no proof whatsoever as to the relevant market for fastening devices and the position of Huck and Townsend in it, and objected to the introduction of proof as to substitutes for the patented devices. (R. 366) Its position at trial was that it did not have to concern itself with competition in any area broader than that encompassed by the patent claims. Even here, in fact, the record shows that in fact Huck issued two licenses under its patents to make titanium lockbolts. (Fdg. 22, R. 712) While Huck and Townsend did not fabricate lockbolts from this metal, it certainly is not at variance with the record to assume that titanium lockbolts—with their obvious application in the aircraft industry—offered competition to other lockbolts. Thus in terms of a product market, not only were Huck and Townsend not shown to have exclusive

control, but the license itself was not even shown to be exclusive.

3. There is some suggestion by the Government that the exclusive arrangement here involved a practical delegation to Townsend of Huck's powers to grant or refuse licenses. The Government states: "For whenever Huck might otherwise be inclined to grant a license, it would inevitably be most reluctant to do so over Townsend's objection, and thus run the risk of price-cutting by the latter. At the same time Huck naturally would seek Townsend's agreement to the issuance of a new license that might be advantageous to Townsend." (Gov't Br., p. 50)

These assertions rest on pure fantasy. There is nothing in the record that indicates that Townsend was ever consulted at all in connection with Huck's decisions as to the grant of additional licenses. In a finding not controverted here by the Government, the District Court found that Huck's licensing decisions "are not shown to have been participated in by or known to defendant Townsend Company, or to have occurred otherwise than by Huck, in the exercise of its own judgment and right to select or reject prospective licensees and to prefer one over others for considerations within its discretion." (Fdg. 22, R. 712-13) —Indeed, as the District Court found, all the proofs indicate that Huck's policy with respect to licensing was dictated by purely business considerations in the interests of the exploitation of its patents. Thus, putting to one side the question whether active participation by an exclusive licensee in granting or denying waivers of the exclusive feature of his license could ever amount to a violation of Section 1 of the Sherman Act, it is manifest that no such situation was presented here.

* * * *

Finally, it must be remarked that the question whether exclusive licenses with price-restriction clauses should be held to be *per se* violations of the Sherman Act, involves many of the same problems, in terms of the content of the present record, presented by the Government's broader contention that *General Electric* should be overruled. There is no real basis in the record on which the Court can arrive at an informed judgment on the matter. The Government has demonstrated neither the justification nor the need for erecting a *per se* rule against the addition of an exclusivity feature to the single "second-source" price restrictive license sanctioned by *General Electric*. The conclusion seems plain that its contention is really a subsidiary of its central point that *General Electric* should be overruled and must stand or fall with it.

CONCLUSION

This case furnishes no basis on which the Government should be relieved from its waiver of any intent to question the *General Electric* rule; and the record provides no occasion for any reexamination, or for that matter, any extended discussion, of that rule by the Court. Moreover, the other question presented by the Government is not legally distinguishable from the question whether *General Electric* should be overruled.

Accordingly, the judgment of the District Court should be affirmed on the grounds stated in that court's opinion.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

JOHN A. BLAIR
J. KING HARNESS
JOHN C. STERRITT
700 Fisher Building
Detroit, Michigan 48202

ALBERT M. STERN
2388 First National Building
Detroit, Michigan 48226

Attorneys for Appellee
Huck Manufacturing Company

THOMAS W. POMEROY, JR.
S. K. McCUNE
W. WALTER BRAHAM, JR.
1100 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Appellee
Townsend Company

Of Counsel:

ARNOLD, FORTAS & PORTER
Washington, D. C.

HARNESS, DICKEY & PIERCE
Detroit, Michigan

STERN and ROSSIER
Detroit, Michigan

KIRKPATRICK, POMEROY, LOCKHART & JOHNSON
Pittsburgh, Pennsylvania

September, 1965.

SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1965.

United States, Appellant, *v.* Huck Manufacturing Co. et al.	On Appeal From the United States District Court for the Eastern District of Michigan.

[December 6, 1965.]

Per Curiam.

Judgment affirmed by an equally divided Court.

Mr. Justice Fortas took no part in the consideration or decision of this case.